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Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

MELISSA AMSCHWAND, individually and on behalf of the Estate of Thomas Amschwand,
Petitioner,

v.

SPHERION CORP., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that a participant in or beneficiary of a covered plan may bring a civil action to enjoin violations of ERISA or of the plan or "to obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The question presented is whether the court of appeals erred in holding that *equitable relief* in this statute does not include make-whole relief equal to the insurance benefits to which a plan beneficiary would have been entitled but for a plan fiduciary's breach of fiduciary duty.

PARTIES TO THE PROCEEDINGS

Petitioner is Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand. Respondents are Spherion Corp., individually and as plan administrator of the group life policies 779407-10-001 and 779407-11-001; Group Plan Life Policies 779407-10-001 and 779407-11-001; Trustees of the Interim Health Benefits Trust Group Life Plan; and Group Life and Accidental Death and Dismemberment Insurance Plan.

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PETITION FOR A WRIT OF CERTIORARI

Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting respondents' motion for partial summary judgment (App., *infra*, 26a to 42a) is unreported. The opinion of the court of appeals affirming the district court (App., *infra*, 1a to 14a) is reported at 505 F.3d 342.

JURISDICTION

The court of appeals entered its judgment on October 18, 2007, and denied Petitioner's petition for rehearing on November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case turns on the meaning of *equitable relief* in § 502(a)(3) of ERISA, which provides:

> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

> plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3) (§ 1132 is set out in full at App., *infra*, 44a to 58a).

STATEMENT OF THE CASE

1. The facts of this case are simple and stark. Mr. Amschwand was a Spherion employee who had been diagnosed with angiosarcoma, a rare and deadly form of cancer, and who expected to die. In 2000, while Mr. Amschwand was on medical leave, Spherion decided to replace Prudential with Aetna as the life insurer under its employee benefit plan. The new Aetna policy included a "special provision" entitled the "Active Work Rule": "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day."

Spherion, as plan administrator and a named plan fiduciary, repeatedly assured Mr. Amschwand that he was covered under the Aetna plan and that he was entitled to the same benefits under it as under the Prudential plan. No one ever told Mr. Amschwand about the Active Work Rule. Indeed, Spherion repeatedly refused to provide Mr. Amschwand with the plan documents that would have put him on notice of this rule, claiming that these documents were "not yet available" or simply failing to respond to Mr.

Amschwand's requests altogether. It is undisputed that had Mr. Amschwand been aware of the Active Work Rule he could and would have complied with it. Because of Spherion's assurances, however, Mr. Amschwand never worked the one full day required by the Active Work Rule to trigger his Aetna coverage. And, sure enough, when he died in February 2001, Aetna relied on the Active Work Rule to deny coverage — declining to waive the rule, as it had done for all other employees affected.

Petitioner, Mr. Amschwand's widow, sued Spherion seeking, in part, "monetary losses caused by [Spherion's] breach of fiduciary duty" — that is, the life-insurance benefits she lost on account of Spherion's failure to tell Mr. Amschwand about the Active Work Rule, its failure to give him the documents that would have put him on notice of that rule, and its affirmative misrepresentations that Mr. Amschwand was covered under the Aetna plan. The United States District Court for the Southern District of Texas (Judge Ewing Werlein, Jr.) had jurisdiction under 28 U.S.C. § 1331. Judge Werlein regarded Petitioner's claim as one for "money damages" and granted Spherion's motion for summary judgment on the ground that "money damages are not available under ERISA § 502(a)(3), which provides only for 'appropriate equitable relief.' 29 U.S.C. § 1132(a)(3)." App. at 31a to 32a. The United States Court of Appeals for the Fifth Circuit (Chief Judge Edith H. Jones and Judges Fortunato P. Benavides and Carl E. Stewart) affirmed.

Both the district court and the court of appeals thought themselves constrained to deny Petitioner

relief under this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, — U.S. —, 126 S. Ct. 1869 (2006). Judge Benavides' special concurrence in the Fifth Circuit — which Petitioner here quotes in full — captures what took place below:

> The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

App. at 14a; *see also* App. at 2a ("Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), we must deny relief.") (Jones, C.J.); App. at 33a to 40a (holding relief foreclosed by *Mertens* and *Great West*).

The sole issue presented by this appeal — and the issue upon which Petitioner's entire case below turns — is whether her claim for monetary losses caused by Spherion's breach of fiduciary duty is, contrary to the Fifth Circuit's holding, a claim for equitable relief under § 1132(a)(3).

2. a. "ERISA's comprehensive legislative scheme includes an integrated system of procedures for its enforcement. This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to Congress' purpose

of creating a comprehensive statute for the regulation of employee benefit plans." *AETNA Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (internal quotations and citations omitted). For this reason, § 1132(a) has broad preemptive effect: "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.* at 209. Unless ERISA provides a remedy for a plan fiduciary's breaches of fiduciary duty, no such remedy exists.

The Fifth Circuit's decision in this case is inconsistent with Congress's intent to create a comprehensive and sensible remedial scheme for the enforcement of ERISA because it creates an inexplicable gap in that scheme. Had Spherion violated the terms of the plan, Petitioner could have sued to recover the benefits due her under § 1132(a)(1)(B) ("A civil action may be brought—(1) by a participant or beneficiary— * * * (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."). Had Spherion's breach of fiduciary duty harmed the plan or if the remedy for its breach would flow to the plan, Petitioner could have sued under § 1132(a)(2) ("A civil action may be brought— * * * (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."). *See* 29 U.S.C. § 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan

resulting from each such breach * * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.").

Because, instead of violating the terms of the plan, Spherion deceived Mr. Amschwand into failing to comply with the plan, Spherion escapes liability under § 1132(a)(1)(B). And because Spherion injured Petitioner directly, rather than through her interest in the plan, that is, because Spherion's breach relates to immediately payable benefits rather than future benefits, Spherion escapes liability under § 1132(a)(2). But these two facts — (1) that the breach of fiduciary duty consisted in deceit about plan terms rather than a violation of plan terms and (2) that the lost benefits are immediately payable instead of payable in the future — cannot serve as the basis for any sensible distinction. Whether the breach of fiduciary duty constitutes deceit about plan terms or a violation of plan terms and whether a breach results in lost benefits that are immediately payable or payable in the future, the result should be the same. The Fifth Circuit's decision makes these facts matter when they shouldn't.

This result, because it is inconsistent with the intent of Congress to erect a comprehensive and sensible remedial scheme, should not be permitted unless it is required by ERISA's text or this Court's prior decisions. It is not.

b. Neither ERISA's text nor this Court's prior decisions interpreting § 1132(a) require the result that the Fifth Circuit reached. Indeed, properly carried out,

the analysis required by this Court's prior decisions leads to the opposite conclusion: that Petitioner may sue under § 1132(a)(3). This is because the relief that Petitioner seeks — Spherion's making whole the monetary losses its breach of fiduciary duty caused her, namely, the life-insurance benefits that she lost because, as a result of Spherion's deceit, Mr. Amschwand did not satisfy the Active Work Rule -- is within the meaning of *equitable relief* as that term is used in § 1132(a)(3). Make-whole relief in the amount of Petitioner's lost life-insurance benefits is equitable relief because, in the days of the divided bench, Spherion's breach of fiduciary duty would have given Petitioner a cause of action in equity and Petitioner has satisfied all the special conditions, including the absence of any equitable defenses, that equity attached to the award of make-whole relief.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (money damages against non-fiduciary not equitable relief), and *Great-West Life & Annuity Insurance Co v. Knudson*, 534 U.S. 204 (2002) (restitution at law, as opposed to restitution at equity, not equitable relief), this Court held that *equitable relief* in § 1132(a) is limited to "those categories of relief that were *typically* available in equity," *Mertens*, 508 U.S. at 256. The clearest statement of what this requirement means is in Chief Justice Roberts's opinion for the unanimous Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006) (restitution at equity is equitable relief).

In *Sereboff*, the Court explained that an action seeks equitable relief when "the nature of the recovery" and "the basis for [the] claim" are equitable.

Id. at 1874. It is the first of these requirements that is at issue here and that the Court addressed in *Mertens* and *Knudson*. *Mertens* held that money damages sought against a non-fiduciary were not an equitable recovery because they were awarded primarily at law and only on special occasions, such as in the context of beneficiaries' suits for breach of trust over which the equity courts had exclusive jurisdiction, in equity. *Mertens*, 508 U.S. at 255–57.

Mertens concerned a remedy, money damages, that was traditionally legal but occasionally available in courts of equity. Such a remedy cannot be within the meaning of *equitable relief* because, since all legal remedies were occasionally available in courts of equity through the exercise of what we would today call an ancillary or supplemental jurisdiction, including these remedies would elide *equitable* from § 1132(a)(3). *Id.* at 257–58. It does not follow from this, however, that whenever a remedy is available both at law and in equity, it is not within the meaning of *equitable relief*. The same remedy may be available both at law and in equity and yet constitute equitable relief if law and equity attach different conditions to the remedy and the special conditions attached by equity are satisfied.

Sereboff and *Knudson* illustrate this rule. "[O]ne feature of equitable restitution was that it sought to impose a constructive trust or equitable lien 'on particular funds or property in the defendant's possession.' That requirement was not met in *Knudson*, because 'the funds to which petitioners claim[ed] an entitlement' were not in Knudson's possession but had instead been placed in a 'Special

Needs Trust' under California law." *Sereboff*, 126 S. Ct. at 1874 (internal citations omitted) (quoting *Knudson*, 534 U.S. at 207, 213–14). In *Sereboff*, by contrast, the plaintiff did seek specifically identifiable funds within the possession and control of the defendant. Consequently, the "impediment to characterizing the relief in *Knudson* as equitable [was] not present." *Ibid.* *Sereboff* and *Knudson* teach that when a remedy, like restitution, is available both at law and in equity, it constitutes equitable relief if, but only if, the special conditions that equity attaches to it are satisfied: in those cases, the special condition of specifically identifiable funds in the possession and control of the defendant.

Petitioner seeks to be made whole from the monetary losses that Spherion's breaches of fiduciary duty caused. This is a form of relief that, in the days of the divided bench, was available both at law, where it was called money damages, and at equity, where it was part of what was called make-whole relief. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). But, just as in the case of restitution, law and equity attached different conditions to the award of this relief. In addition to the standard equitable defenses, equity attached the condition that the monetary relief be necessary to cure the improper administration of a trust or other relationship giving rise to fiduciary duties. While a suit for this kind of make-whole relief eventually came to be cognizable in law courts in addition to equity courts, money paid to cure the maladministration of a trust was as quintessentially

an equitable remedy as money paid to cure the breach of a contract was a quintessentially legal one:

> In some cases where no questions of accounting or discretion are involved, there has been a tendency to permit the beneficiary to sue the trustee or a third person at law, to recover either a sum due under the trust or damages for a wrongful act. Where no problems of trust administration are involved, the law court at times feels that it can competently adjudge the rights of the parties. The extent of this exceptional aid by the courts of law to the trust beneficiary is difficult to state. The beneficiary is safe in proceeding in equity in all cases. Sometimes, where his right to relief is clear and no construction of the trust or guidance of the trustee is involved, the beneficiary may be able to persuade a court of law to take jurisdiction of his case.

GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1995).

So too under the Restatement of Trusts. The Restatement notes Bogert & Bogert's exceptional case: "If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." RESTATEMENT (2D) OF TRUSTS § 198(1) (1959)). But the Restatement goes on to explain that, "Although the beneficiary can maintain an action at law against the trustee as stated in this Section, he has also equitable remedies against

the trustee." *Id.* cmt. a. Under the Restatement, these equitable remedies include "a suit * * * to compel the trustee to redress a breach of trust," *id.* § 199(c), § 199(c) cmt. c, in which the remedies awardable include "any profit which would have accrued to the trust estate if there had been no breach of trust," *id.* § 205. Again, money sought to redress the maladministration of a trustee that harms the trust beneficiary is a quintessentially equitable remedy available only occasionally in a court of law.

When the court's analysis in *Sereboff*, *Knudson*, and *Mertens* is properly applied, the relief that Petitioner seeks qualifies as equitable under § 1132(a). It is at least like the remedy, restitution, at issue in *Sereboff* and *Knudson*: available both at law and in equity, but equitable because the special conditions attached by equity to its provision are satisfied. Indeed, it is really like the inverse of *Mertens*: in *Mertens*, at issue were money damages sought by a non-fiduciary, essentially on a tort claim, a legal remedy occasionally within the ancillary jurisdiction of equity courts; here, at issue is monetary relief sought to make whole damage to a beneficiary arising out of the maladministration of a trust, that is, out of the trustee's breach of fiduciary duties, an equitable remedy occasionally within the expanding jurisdiction of the law courts, but still an *equitable* remedy.

c. Nothing in this argument is inconsistent with the Court's decision or reasoning in *Mertens*. The basis for the Court's reasoning in *Mertens* was that *equitable relief* must not be read so as to elide *equitable* entirely. 508 U.S. at 255–58. Accepting the argument that any relief ever granted in an equity

court is equitable relief would elide *equitable* because of the ancillary jurisdiction of equity courts to award legal remedies in breach-of-trust cases. *Ibid.* But to accept Petitioner's argument is not to accept this argument, for Petitioner argues not that the monetary relief she seeks would be available in *some* case cognizable in an equity court, but that it would be available in *her* case, if brought in an equity court in the days of the divided bench.

Petitioner's argument does not elide *equitable* because it applies only when the plaintiff has satisfied the particular conditions equity attached to awards of money, in this case, that they be part of making whole the damage to a beneficiary caused by the maladministration of a trust. *Equitable* still serves to block cases like *Mertens*, in which the plaintiff does not satisfy the particular conditions equity attaches to awards of money — namely, the condition that the damages be caused by a fiduciary and arise from the maladministration of a trust.

REASONS FOR GRANTING THE PETITION

1. This Court has already granted certiorari on the question presented in this case, *see LaRue v. DeWolff, Boberg & Associates, Inc.*, 127 S. Ct. 2971, 2971 (2007) (granting certiorari); Petition for Certiorari, *LaRue*, *supra*, at i ("The Second Question Presented is: Does § 502(a)(3) permit a participant to bring an action for monetary 'make-whole' relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as 'surcharge')?"), but it did so in a case that also presents a different question, *ibid.* ("The First Question Presented is: Does § 502(a)(3) of

ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?"), that, if answered in favor of the petitioner, moots the question presented in this case. By granting certiorari in Petitioner's case, this Court can assure itself a procedurally unblemished opportunity to address the availability of make-whole relief under § 1132(a)(3).

2. Granting certiorari is appropriate to clarify the nature of the *Mertens–Knudson–Sereboff* test in cases, like this one, that concern remedies available both in courts of law and in courts of equity. On the best reading of these cases, the test is that a remedy qualifies as *equitable relief* even though it was available both in courts of law and in courts of equity if the plaintiff satisfies the special conditions that equity attached to the provision of that remedy. In the specific context of monetary relief, a plaintiff satisfies the special conditions that equity attached if no equitable defenses apply and the monetary relief is necessary to make whole injury caused by the defendant's maladministration of a trust. The perception of the Fifth Circuit and other courts of appeal that monetary relief is *never* equitable relief is inconsistent with Congress's intent to put in place a comprehensive and sensible remedial scheme for ERISA and results from a failure to conduct the more nuanced analysis required by this Court's decisions.

3. The question presented in this case is of unusual national importance because it affects every employee benefit plan governed by ERISA. At issue is whether ERISA provides a remedy — which, because

of ERISA's broad preemptive effect, is to say whether a remedy exists — for a plan fiduciary's deceit of a participant that affects terminal rather than future benefits. Most insurance (as opposed to pension) cases in which there is deceit as to the terms of the policy fit this mold because the deceit is revealed only when payment under the insurance policy comes due. The egregious facts of this case, namely, that Mr. Amschwand did everything he should have done and was nevertheless denied relief by Aetna and, unless this Court steps in, ERISA, highlight the importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2007

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20346

[Filed October 18, 2007]

MELISSA AMSCHWAND, INDIVIDUALLY)
AND ON BEHALF OF THE ESTATE OF)
THOMAS AMSCHWAND)
Plaintiff-Appellant)
)
v.)
)
SPHERION CORP; ET AL)
Defendants)
)
SPHERION CORP, INDIVIDUALLY AND)
AS PLAN ADMINISTRATOR OF THE)
GROUP PLAN LIFE POLICIES)
779407-10-001 & 779407-11-001;)
GROUP PLAN LIFE POLICIES,)
779407-10-001 & 779407-11-001;)
TRUSTEES OF THE INTERIM HEALTH)
BENEFITS TRUST GROUP LIFE PLAN;)
)

GROUP LIFE AND ACCIDENTAL)
DEATH AND DISMEMBERMENT)
INSURANCE PLAN)
Defendants-Appellees)
)

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JONES, Chief Judge, and BENAVIDES and STEWART, Circuit Judges.

EDITH H. JONES, Chief Judge:

This appeal addresses whether, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), "other appropriate equitable relief" permits recovery of extra-contractual, or "make-whole," damages in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty. Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), we must deny relief.

I. BACKGROUND

During Mr. Amschwand's medical leave for a bout with cancer that he did not survive, his employer Spherion switched insurance companies, replacing Prudential with Aetna Life Insurance Company ("Aetna") as the new provider of basic and supplemental life insurance benefits under the company Plan. A "special provision" of Aetna's group

insurance policy covering Spherion employees was entitled the "Active Work Rule" and provided:

> If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day.

This provision was expressly noted in the "Summary of Coverage" Aetna prepared for Spherion employees.[1] As part of the transition to the new policy, Aetna and Spherion agreed that the Active Work Rule requirement would be waived for employees like Mr. Amschwand, who were not currently working full-time due to a medical condition that antedated the switch from Prudential to Aetna. For reasons Spherion has failed to explain, however, Mr. Amschwand was not among those who received coverage despite being on disability leave when the Policy took effect on May 1, 2000. Unlike other similarly situated employees, Mr. Amschwand never received a waiver and, unbeknownst to him, he remained subject to the Active Work Rule.

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[1] The Summary of Coverage provision stated: "Active Work Rule: If you happen to be ill or injured and away from work on the date your coverage would take effect, the coverage will not take effect until you return to full-time work for one full day. This rule also applies to an increase in your coverage."

Spherion, an ERISA fiduciary and plan administrator, notified its employees that they could elect to participate in the Aetna Plan during an "open enrollment" period, which commenced in March 2000. Mr. Amschwand duly enrolled and was informed by Spherion that he could maintain his existing $248,000 basic coverage and his $142,000 level of supplemental coverage under the Policy. On November 6, 2000, a representative of Spherion's Human Resources Department orally confirmed to Mr. Amschwand that all of his life insurance was convertible under the Policy and that he remained eligible for all benefits.

As his condition deteriorated, Mr. Amschwand repeatedly contacted Spherion to confirm that he was fully covered under the Aetna Policy. Each time, Spherion representatives failed to mention the Active Work Rule requirement and incorrectly assured him that the full spectrum of coverage he enjoyed under the pre-Aetna Plan remained valid. Moreover, in spite of the Amschwands' repeated oral requests for documentation of the Policy terms and the corresponding Summary of Coverage, Spherion either maintained that informational booklets were not yet available for employees, or simply failed to provide any paperwork describing the conditions of the Policy. Believing himself covered, Mr. Amschwand timely paid the basic and supplemental life insurance premiums while on disability leave until his death in February, 2001. Mr. Amschwand diligently sought to ensure that his wife would be provided for under the Plan. Both parties agree, however, that Spherion never informed him that in order for the Policy to take effect he was required to return to work for at least one full day.

Shortly after her husband's death, Mrs. Amschwand filed a claim with Aetna only to be informed that because her husband had not satisfied the Active Work Rule, he was ineligible for benefits under the Policy. After being denied recovery in Aetna's administrative appeals process, Mrs. Amschwand filed suit seeking relief under ERISA § 502(a)(3) in the form of "monetary losses caused by [the Spherion Defendants'] breach of fiduciary duty."[2] That is, Amschwand sought the equivalent of the combined life insurance benefits that she would have received if her husband had complied with the Active Work Rule. Spherion refunded the premium payments but maintained that the additional demand for money damages did not constitute "appropriate equitable relief' within the meaning of subsection (a)(3). The district court agreed, granting summary judgment for Spherion. The court also dismissed as moot a third-party complaint filed by Aetna. Amschwand appeals.

II. STANDARD OF REVIEW

This court reviews the district court's summary-judgment grant *de novo*, applying the same standard used below. *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006). Summary judgment is

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[2] Amschwand already has recovered statutory damages in the amount of $100 per day from the date of Spherion's failure to timely provide policy documentation, as well as attorney's fees, pursuant to ERISA §§ 502(c)(l)(B) and (g)(l), 29 U.S.C. §§ 1132(c)(l)(B), (g)(l), respectively. The present appeal concerns only the availability of a monetary remedy under § 502(a)(3)

appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P56(c).

III. DISCUSSION

Section 502(a)(3) allows a plan participant, beneficiary, or fiduciary to obtain, *inter alia*, "appropriate equitable relief" to enforce the terms or to remedy violations of an employee-benefit plan. The scope and nature of relief available to aggrieved parties under this statutory provision has been circumscribed by a line of Supreme Court decisions beginning with *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993). Analyzing the remedies that were historically available in courts of equity, the Court in *Mertens* held that § 502(a)(3) did not authorize a suit for monetary damages against a nonfiduciary that participated in the plan fiduciary's breach of duty. Despite the fact that monetary damages were among the remedies historically granted by pre-fusion equity courts in actions brought by a beneficiary against a trustee, the Court reasoned that consequential damages were a legal rather than equitable remedy and denied relief. *Id.* at 255-56, 113 S. Ct. at 2068-69. Justice Scalia supported this conclusion by acknowledging that in trust disputes a court sitting in equity could routinely establish "purely legal rights and grant legal remedies" otherwise beyond its equitable jurisdiction. *Id.* at 256, 113 S. Ct. at 2068; see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES,

§ 870 (rev. 2d ed. 1995). Congress's use of the term "equitable" in subsection (a)(3), therefore, was construed to encompass only categories of relief "*typically* available in equity," like injunction, mandamus, or restitution. *Id.* at 256, 113 S. Ct. at 2069. Had Congress intended subsection (a)(3) to authorize the panoply of legal remedies sometimes awarded by equity courts, the term "equitable" would become superfluous. *Id.* at 257-58, 113 S. Ct. at 2069-70; *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574 (4th Cir. 2006), *cert. granted*, ___ U.S. ___, 127 S. Ct. 2971 (2007). ("[E]quitable relief connotes only a subset of the full palliative spectrum.") (citation and internal quotation marks omitted). Money damages, *Mertens* concluded, were the "classic form of *legal* relief' and thus not a "typically equitable" remedy available under 502(a)(3). 508 U.S. at 255, 113 S. Ct. at 2068.[3]

The spectrum of § 502(a)(3) relief contracted further in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002). Great-West, a nonfiduciary insurance company, sought an injunction for money damages as restitution against a plan beneficiary, who had violated the plan's subrogation clause by failing to reimburse Great-West for his tort recovery in a lawsuit. Although restitution

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[3] This court has held similarly. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 944 (5th Cir. 1999) (noting that § 502(a)(3) excludes "extra-contractual," "make-whole," and "compensatory" damages); *Weir v. Federal Asset Disposition Ass'n*, 123 F.3d 281, 290 (5th Cir. 1997) (no compensatory or punitive damages available under § 502(a)(3) against a fiduciary in her individual capacity).

was mentioned in *Mertens* as "typically equitable," relief, Justice Scalia clarified in *Great-West* that "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212, 122 S. Ct. at 714. The crucial distinction between two historical species of restitution is that equitable restitution seeks only to restore to the plaintiff particular funds or property in the defendant's possession, while legal restitution imposed personal liability for breach of a legal duty. *Great-West* ultimately reaffirms the *Mertens* requirement that the *nature of the relief sought* under § 502(a)(3) be "typically equitable"; it adds a second requirement that the *cause of action giving rise to the claim* be generically equitable as well. Great-West's desired relief was not "equitable" within this interpretation of § 502(a)(3) because under California law a constructive trust or equitable lien cannot be established over funds or property not within a defendant's control.

The freshest of *Mertens*'s progeny, *Sereboff v. Mid Atlantic Medical Services, Inc.*, ___ U.S. ___, 126 S. Ct. 1869 (2006), reinforces the two-part equity test. In *Sereboff*, an injured beneficiary who recovered a tort settlement was sued by the plan fiduciary to recoup medical expenses it had paid on the beneficiary's behalf. But in contrast to *Great-West*, the *Sereboff* beneficiaries retained possession and control of the particular settlement funds that the fiduciary sought. Accordingly, the Supreme Court held that the relief sought by the fiduciary would have been recognized as equitable by a pre-fusion equity court and was subject to the restitutionary remedy of an equitable lien on the settlement funds. *See Sereboff*, ___ U.S. ___, 126 S. Ct. at 1874-75. *Sereboff* seems to confirm that the *sine*

qua non of restitutionary recovery available under § 502(a)(3) is a defendant's possession of the disputed res. *See, e.g., Coan v. Kaufman*, 457 F.3d 250, 264 (2d Cir. 2006) (restitutionary relief is deprived of its equitable character for purposes of § 502(a)(3) "when, as here, the defendants never possessed the funds in question and thus were not unjustly enriched") (citation and internal quotation marks omitted); *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1063 (8th Cir. 2006); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 406 (10th Cir. 2004); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1011 (9th Cir. 1998).

This appeal, in contrast to the Supreme Court cases, is a suit by a *beneficiary* seeking relief under § 502(a)(3) from a plan fiduciary for breach of fiduciary duty.[4] Amschwand places great weight on the distinguishing fact that Spherion's fiduciary status is "critical because, in courts of equity, make-whole relief was routinely available as a remedy for breach of fiduciary duty in cases brought against fiduciaries." Echoing the methodology of Justice Ginsburg's

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[4] As the pleadings demonstrate, this action can alternatively be characterized as a demand for damages from the breach of Thomas Amschwand's life insurance policy. Contrary to Spherion's insistence, breach of contract, although historically not an action brought in equity, does not put equitable recovery under § 502(a)(3) out of Amschwand's reach. *See Sereboff*, ___ U.S. ___, 126 S. Ct. at 1874 ("ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make § 502(a)(3)(B)(ii) an empty promise.").

dissenting opinion in *Great-West* (a rationale resurrected in her concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004)), Amschwand argues that the district court misconstrued *Mertens* and *Great-West*, which narrowly held that extracontractual damages against *nonfiduciaries* are not equitable relief cognizable under § 502(a)(3). Against a fiduciary like Spherion, however, money damages are available under § 502(a)(3) because such a claim would have entitled her to equitable restitution in the pre-fusion equity courts.

Anschwand's proposed distinction among defendants has been rejected by many of our sister circuits. There is no textual argument for drawing this distinction under § 502(a)(3). Under *Great-West*, only the nature of the claim and the relief sought — not the status of the litigants — determine the scope of available § 502(a)(3) recovery.[5] *See, e.g., Callery*, 392 F.3d at 409; *McLeod v. Or. Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996) ("the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question whether damages constitute 'appropriate equitable relief" under § 502(a)(3)). That wider relief was traditionally available in equity courts against fiduciaries than nonfiduciaries is irrelevant to ERISA's

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[5] On its face, § 502(a)(3) defines who may bring an action; it does not condition the scope of recovery on the identity of the defendant. This is not true of other ERISA remedial provisions. *See, e.g., Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 352 & 353 n.13 (5th Cir. 2003) (citing statutory sections).

remedial scheme. *Mertens* and its progeny state that § 502(a)(3) relief is affirmatively *not* grounded in "the special equity-court powers available to trusts." *Great-West*, 534 U.S. at 219, 122 S. Ct. at 718; *Mertens*, 508 U.S. at 258, 113 S. Ct. at 2070; *see also Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper Inc.*, 382 F.3d 587, 596 (6th Cir. 2004).

Amschwand further repeats the unsuccessful argument that because monetary damages for breach of fiduciary duty were sometimes awarded against trustees in courts of equity, they are automatically available under § 502(a)(3). *See, e.g., Davila*, 542 U.S. at 223-24,124 S. Ct. at 2504 (Ginsburg, J., concurring) (arguing that ERISA imports general trust principles recognized by equity courts). *Mertens*, however, held that even if breach of fiduciary duty is a generically equitable claim, the remedy sought — here, restitution — must have been one *typically* awarded, not one that *could have been* awarded, by a court of equity. The species of restitutionary relief sought by Amschwand here does not qualify as a "typically equitable" remedy under *Great-West*. Spherion never maintained possession of Amschwand's insurance proceeds, yet possession is the key to awarding equitable restitution in the form of a constructive trust or equitable lien. In contrast, Amschwand seeks relief—whether characterized as make-whole or restitutionary—that is legal in nature because it represents damages on the insurance contract that Spherion allegedly breached.[6] *See LaRue*, 450 F.3d at

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[6] *Cf. Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 309 n.20 (5th Cir. 2007) (legal restitution is not a remedy cognizable under

575 ("absence of unjust possession is fatal to an equitable restitution claim"); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439,445 (5th Cir. (no § 502(a)(3) recovery because settlement proceeds were in the registry of the Mississippi chancery court, not under the defendant's control). Stated otherwise, even were we to find that Amschwand's cause of action sounds in equity, her desired relief is not typically equitable.

A defendant's possession of the disputed res is central to the notion of a restitutionary remedy, which was conceived not to assuage a plaintiffs loss, but to eliminate a defendant's gain. *See, e.g., Great-West*, 534 U.S. at 229, 122 S. Ct. at 723 (Ginsburg, J., dissenting); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wainsbrough*, 354 F.3d 348, 355-56 (5th Cir. 2003). The Courts of Appeals have widely adopted this reasoning. *See, e.g., LaRue*, 450 F.3d at 576 (value of a plaintiffs loss is a "measure that is traditionally legal, not equitable"); *Coan*, 457 F.3d at 264 (restitutionary remedies are based upon a defendant's gain); *Callery*, 392 F.3d at 406 (same); *Bast*, 150 F.3d at 1011 (defendant's "ill-gotten profit" is integral to equitable restitutionary remedies). Thus, if Spherion breached its fiduciary duty to Mr. Amschwand, the appropriate equitable remedy is the disgorgement of Spherion's ill-gotten

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§ 502(a)(3)); *Coan*, 457 F.3d at 264 (attempted recovery of funds allegedly dissipated by fiduciary's mismanagement of a 401(k) plan not actionable under § 502(a)(3)); *Callery*, 392 F.3d at 406 (attempted recovery of life insurance benefits by plan beneficiary who alleged breach of fiduciary duty not cognizable under § 502(a)(3)).

profits, *i.e.*, refund of the policy premiums. *See Lind v. Aetna Health, Inc.*, 466 F.3d 1195, 1200-01 (10th Cir. 2006) (citing *Callery*, 392 F.3d at 406); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944-45 (8th Cir. 1999).

Obtaining the lost policy proceeds, as Amschwand requests, is simply a form of make-whole damage.[7] *Cf. Coan*, 457 F.3d at 264; *Callery*, 392 F.3d at 406. This demand is not equitable in derivation, but is akin to the legal remedies of extracontractual or compensatory damages. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1995) (payment of a sum due under the trust or damages for a trustee's wrongful act are legal remedies occasionally granted by an equity court); RESTATEMENT (SECOND) OF TRUSTS § 198(1) (1959) (enforcement of trustee's duty to pay money was an action at law).[8] In contrast to the make-whole

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[7] Amschwand's alternative characterization of the remedy she seeks under § 502(a)(3) as injunctive relief that would preclude Spherion's withholding payment of the make-whole damages is essentially indistinguishable from a demand for payment. Such attempts to recharacterize a desired § 502(a)(3) remedy as a purely equitable form of relief, like an injunction, have been consistently rejected. *See Great- West*, 534 U.S. at 210-11, 122 S. Ct. at 713; *Mertens*, 508 U.S. at 255; 113 S. Ct. at 2068; *Bowen v. Massachusetts*, 487 U.S. 879, 915-16, 108 S. Ct. 2722, 2743 (1988) (Scalia, J., dissenting); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 655 (3d Cir. 2007); *Callery*, 392 F.3d at 405.

[8] This court has explicitly rejected language from our pre-*Mertens* decisions which speculates that such relief could be available

damages sought here, equitable restitution was designed to restore the trust res damaged by a trustee's breach of duty; it did not aim to compensate a beneficiary for expected gains that would have accrued absent a fiduciary's breach. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959). Because the remedy sought here was not typically available in pre-fusion courts of equity, we are obliged to follow the Supreme Court's decision in *Great-West* and deny § 502(a)(3) relief.

IV. CONCLUSION

For the aforementioned reasons, the judgment of the district court is **AFFIRMED**.

BENAVIDES, Circuit Judge, specially concurring:

The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

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under § 502(a)(3). *See, e.g., Rogers*, 167 F.3d at 944, *recognizing abrogation of Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992) ("Although our decision in *Corcoran* may have 'left the door open' to the possibility of recovering certain extra-contractual damages necessary to make a plaintiff whole, the Supreme Court firmly closed this door in *Mertens*.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed March 28, 2006]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY and as PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

FINAL JUDGMENT

For the reasons stated in the Memorandum and Order entered August 24, 2005, the Memorandum and Order entered March 6, 2006, and the separate Order signed this date that awards reasonable attorney's fees, expenses, and taxable costs, it is

ORDERED and ADJUDGED that Plaintiff Melissa Amschwand, Individually, and on behalf of the Estate of Thomas Amschwand, shall have and recover from Defendants Spherion Corporation, individually, and as Plan Administrator, Trustees of the Interim Health Benefits Trust Group Life Plan, and Group Life and Accidental Death and Dismembership Insurance Plan, the sum of SEVENTY-EIGHT THOUSAND EIGHT HUNDRED FORTY and 13/100 DOLLARS ($78,840.13), plus interest on all unpaid amounts thereof from the date hereof until paid at the rate of 4.77% per annum, compounded annually. (The foregoing sum includes taxable costs to which Plaintiff is entitled, and therefore no separate bill of costs shall be filed.)

All other and further relief sought by any party herein and not expressly granted is DENIED.

This is a **FINAL JUDGMENT**.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas on this 28th day of March, 2006.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed March 6, 2006]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY AND AS PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

MEMORANDUM AND ORDER

Pending is Plaintiff's Second Motion for Summary Judgment (Document No. 152).[1] After having carefully reviewed the motion, the response, the evidence submitted by the parties, and the applicable law, the Court concludes that the motion should be granted.

I. *Background*

The background for this suit and identities of the parties may be found in the Court's Memorandum and Order entered August 24, 2005. Remaining in this lawsuit are Plaintiff's claims for statutory penalties and attorney's fees under ERISA § 502(c)(1)(B) and (g)(1). *See* 29 U.S.C. § 1132(c)(1)(B), (g)(1).[2] Plaintiff alleges that despite numerous requests, Spherion failed to provide to her and her husband copies of the Plan documents that would have alerted them to the Plan's terms for coverage, including the Active Work Rule, which stated: "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage)

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[1] Also pending are the Spherion Defendants' Objections and Motion to Strike Plaintiff's Summary Judgment Evidence (Document No. 157), to which Plaintiff files no response in opposition. In accordance with Local Rule 7.4, the motion is deemed unopposed. Defendants' objections are meritorious, and the motion to strike is GRANTED.

[2] The parties agree that the issue of attorney's fees should be resolved by way of a fee application after the Court rules on the pending summary judgment motion. *See* Document Nos. 152 at 9; 156 at 1.

would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day." *See* Document No. 104 ¶¶ 15-16, 32, 34-35, 37-38, 41-44, 51, 58. Accordingly, Plaintiff seeks an award of statutory damages in the amount of $100 per day from the date of Spherion's "failure or refusal to send the documents requested by Plaintiff." *Id.*

Although Plaintiff brings the motion pursuant to Federal Rule of Civil Procedure 56, Defendants state in response to the motion that "not all of the material facts are undisputed." Document No. 156 at 1. Nevertheless, Defendants "respectfully request that the Court resolve the instant penalty issue--including all disputed issues of material fact--pursuant to the instant motion," given that a "formal trial or hearing on the issue would be expensive, both to the parties and in terms of the Court's resources, but would add nothing to the presentation of the relevant argument." *Id.* Plaintiff agrees. *See* Document No. 152 at 2.

II. *Discussion*

Section 502(c)(1)(B) of ERISA provides that:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within

> 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). "In exercising its discretion to determine whether and what amount of penalty to award the court may consider, among other factors, the prejudice to the plan participant and the conduct of the administrator, as well as the number of requests for compliance made and the length of the delay." *Ferguson v. Vice-President of Human Resources, Volt Mgmt. Corp.*, No. Civ. A. H-00-2104, 2001 WL 34070237, at *5 (S.D. Tex. Aug. 13, 2001) (Lake, J.) (citing *Davis v. Featherstone*, 97 F.3d 734, 738 (4th Cir. 1996); *Ziaee v. Vest*, 916 F.2d 1204, 1210-11 (7th Cir. 1990)).

The uncontroverted evidence is that Plaintiff's father and attorney, Anson Phipps ("Phipps"), made Plaintiff's first written request for Plan documents on July 20, 2001, approximately five months after Mr. Amschwand's death. *See* Document No. 152 ex. 8.[3] On August 24, 2001, Spherion's director of benefits wrote Phipps and purported to transmit the Aetna Life Insurance Plan Certificate, the Canada Life Guide to Benefits, and the Prudential Group Life and Disability Insurance Policy. *Id.* ex. 11. When none of these items

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[3] Although there is evidence that Mr. Amschwand requested but never received copies of the Aetna Policy and/or the applicable SPD before his death, Plaintiff was unable to locate a writing evidencing his requests. Document No. 152 at 2-3.

was enclosed with the letter, however, Phipps made a second request for the applicable Plan documents on September 6, 2001. *Id.* ex. 12; ex. 18 ¶¶ 11-12. On September 13, 2001, Phipps received from Spherion, *inter alia*, an Amendment Sheet for disabled employees prepared by Aetna; Phipps did not, however, receive a copy of the Policy. *See id.* ex. 18 ¶ 14; *see also* Document No. 156 ex. 1. On January 2, 2002, Phipps made a third request for a copy of the Policy. Document No. 152 ex. 14. On March 29, 2002, Spherion responded by sending Plaintiff a copy of the Prudential Group Life and Disability Policy, which, Spherion stated, it had determined was the insurance policy applicable to Mr. Amschwand. *Id.* ex. 17. Spherion did not, however, include a copy of the Aetna Policy. *Id.* ex. 18 ¶ 19.[4]

According to Plaintiff, she did not receive a complete set of the applicable Aetna documents--including the Aetna Policy and the applicable SPD with the Active Work Rule--until Aetna produced them in this litigation on May 8, 2003. *Id.* ex. 24 ¶¶ 4-5. Plaintiff therefore requests that the

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[4] In the letter, Spherion also stated that it was enclosing "all applicable plan documents," including documents covering "the period beginning with Mr. Amschwand's employment through April 20, 2000" and "the period beginning May 1, 2000 through the date of Mr. Amschwand's death." *See* Document No. 152 ex. 17. Spherion suggests that this statement is evidence that it complied with Plaintiff's request for Plan documents. *See* Document No. 156 at 45. The uncontroverted affidavit testimony of Plaintiff and Phipps, however, indicates that whatever documents Spherion sent, they did not include a copy of the Aetna Policy. *See* Document No. 152 ex. 18 ¶ 19; ex. 24 ¶¶ 4-5.

Court assess a statutory penalty against Spherion in the maximum amount of $100 per day for the 656-day period from July 20, 2001--when Plaintiff first requested the Plan documents--to May 8, 2003--when Aetna produced the Plan documents in this litigation--for a total of $65,600. *See* Document No. 152 at 6. Plaintiff contends that such an award is appropriate in this case because: (1) the prejudice suffered by Plaintiff is overwhelming, given that Mr. Amschwand requested the Plan documents before his death and "could have easily shown up to work for one day and been eligible for the death benefits which have now been denied" to Plaintiff; and (2) Spherion "essentially acted with deliberate indifference to its responsibilities" when it failed to meet Plaintiff's requests, particularly since it "made a conscious decision not to deliver plan documents to its plan participants to because of the associated cost in doing so." *Id.* at 7-8.

In response, the Spherion Defendants argue that the Court should decline to impose a penalty because they "attempted in good faith to comply with Plaintiff's requests for Plan documents." Document No. 156 at 4. Defendants admit that "[i]n hindsight it appears that errors may have been made," but Defendants argue that they "did not act in bad faith" or intentionally delay Plaintiff's receipt of the appropriate Plan documents. *Id.* at 5. Defendants further contend that Plaintiff was not prejudiced by their failure timely to provide the Plan documents because all of the alleged prejudice and harm of which Plaintiff complains occurred before Mr. Amschwand's death. *Id.* Given that Plaintiff's receipt of the applicable Plan documents "had absolutely no impact on the merits of

her claim or the outcome of this lawsuit," Defendants argue, any statutory penalty would be inappropriate. *Id.* But should the Court elect to exercise its discretion to impose a penalty, Defendants contend that the amount of the penalty should be substantially less than the $100 daily maximum. *Id.* at 6-7.

After carefully considering the relevant factors, including (1) Plaintiff's repeated attempts to obtain a complete copy of the appropriate and applicable Plan documents from Defendants, (2) Defendants' gross incompetence and neglect in supplying the properly requested documents, (3) testimony of Defendants' former employee that "Spherion was operating like a loose ship when it came to notifying employees of plan changes" and "was not timely or consistent in dispersing the Summary Plan Documents to its employees," *see* Document No. 152 ex. 3 ¶¶ 18, 21, (4) the inexcusable frustration, inconvenience, delay, and expense that Plaintiff necessarily incurred in unsuccessfully attempting to obtain the appropriate and applicable Plan documents from Defendants, and (5) the mitigating factors (i) that no proof has been presented of actual bad faith on the part of Defendants and (ii) that the delays did not affect the viability of Plaintiffs' claims for the life insurance benefits,[5] the Court finds that imposing a statutory penalty in the

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[5] While Defendants' incompetence in responding to Mr. Amschwand's survivors did not affect the viability of the claim for policy proceeds, it is likely that the same kind of incompetence on the part of Defendants served to withhold from Mr. Amschwand advice regarding the requirement that he return to work for one full day, which he could have done, to obtain full coverage of $426,000 in life insurance proceeds on his life.

amount of $85.00 per day for 656 days is appropriate to the total circumstances.

III. Order

Accordingly, it is

ORDERED that Plaintiff Melissa Amschwand's Second Motion for Summary Judgment (Document No. 152) is GRANTED, and the Spherion Defendants shall pay to Plaintiff a statutory penalty in the amount $55,760.00. It is further

ORDERED that within the next fourteen (14) days the parties shall confer in good faith to reach agreement on the fair and reasonable amount of attorney's fees that should be awarded to Plaintiff in connection with prosecuting her claim for statutory damages. The Court believes that the parties can agree on this issue. If not, then the parties shall file a joint report so advising the Court no later than 21 days after the entry of this Order. The Court will thereafter--if necessary--set a briefing schedule on the attorneys' fees issue.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 6th day of March, 2006.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed August 24, 2005]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY and as PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

MEMORANDUM AND ORDER

Pending are the following: Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion for Partial Summary Judgment (Document No. 127); Plaintiff Melissa Amschwand's [Cross] Motion for Partial Summary Judgment (Document No. 131); and Third-Party Defendant Aetna Life Insurance Company's Motion for Summary Judgment on Third-Party Complaint (Document No. 124).[1] After having carefully reviewed the motions, responses, replies, and the applicable law, the Court concludes as follows:

I. *Background*

This case arises under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq. Plaintiff Melissa Amschwand ("Plaintiff") brings suit against Defendants Spherion Corporation ("Spherion"), Trustees of the Interim Health Benefits Trust (the "Trustees"), and the Group Life and Accidental Dismemberment Insurance Plan (the

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[1] Also pending is Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion to Strike (Document No. 140), in which Defendants lodge a large number of objections to Plaintiff's summary judgment evidence. Virtually all of these objections are without merit, but because the Court concludes that Defendants are entitled to summary judgment even if Plaintiff's challenged evidence is considered, the motion to strike will be DENIED AS MOOT.

"Plan") (collectively, "Spherion Defendants" or "Defendants") in an effort to recover the value of basic and supplemental life insurance benefits that Plaintiff contends she would have received under the Plan but for a breach of fiduciary duty by Spherion, the former employer of Plaintiff's late husband Thomas Amschwand ("Mr. Amschwand").[2]

Mr. Amschwand began working at Spherion in February 1998.[3] At that time, Mr. Amschwand participated in the Plan, a life insurance plan established and maintained by Spherion and insured through a group life insurance policy issued by Prudential Life Insurance Company of America ("Prudential"). Document No. 104 ¶ 14. On August 12, 1999, Mr. Amschwand was diagnosed with cardiac angiosarcoma, a rare form of heart cancer. *Id.* ¶ 10.

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[2] Although Plaintiff initially sued Aetna Life Insurance Company ("Aetna"), the insurer of Spherion's life insurance Plan, Plaintiff voluntarily dismissed Aetna from the lawsuit in October, 2004. *See* Document No. 100. Plaintiff evidently determined that her husband did not meet Aetna's conditions for coverage prior to his death. *See* Document No. 131 at 11-12. Defendants then filed a third-party complaint against Aetna, alleging that "[i]n the event the Spherion Defendants (or any of them) are found liable to Plaintiff, then Aetna should be held liable to the Spherion Defendants for all such liability." Document No. 120 ¶ 11.

[3] According to Plaintiff, Mr. Amschwand was actually hired by Spherion's predecessor, a company called Anatec. Document No. 104 ¶ 9. Anatec was purchased by Norrell Information Services ("Norrell") in July, 1998, and a year later, Norrell was purchased by Interim Technology Consulting, who changed Norrell's name to Spherion in July, 2000. *Id.*

Due to his illness, Mr. Amschwand took Family and Medical Leave Act leave on August 16, 1999, followed by disability leave, and never returned to work. He died on February 11, 2001.

Effective May 1, 2000, Spherion changed life insurance carriers. Basic and supplemental life insurance benefits under the Plan were insured through Group Policy No. GP-779407 (the "Policy"), which Spherion purchased from Aetna. Document No. 124 ex. A-1. The Policy contained an "Active Work Rule," which stated: "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day." Document No. 124 ex. A-1 at A0000310. The Active Work Rule was also set forth in the "Summary of Coverage" (the "SPD") Aetna created for Spherion's employees. *Id.* ex. A-2 at A0000146 ("If you happen to be ill or injured and away from work on the date your coverage would take effect, the coverage will not take effect until you return to full-time work for one full day.").[4] According to Plaintiff, Aetna and Spherion agreed that the Active Work Rule would be waived for certain employees identified by Spherion as not actively at work on the effective date of the Policy. Unfortunately, Spherion did not provide Mr. Amschwand's name to Aetna.

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[4] It is uncontroverted that Mr. Amscwhand requested but never received copies of the Policy and/or the SPD before his death.

In March, 2000, Spherion notified its employees, including Mr. Amschwand, that the "open enrollment" period during which Spherion employees could elect to participate in the Plan had commenced. *See* Document No. 133 ex. 11. Mr. Amschwand participated in open enrollment, purchasing basic and supplemental life insurance benefits, and in November, 2000, Spherion confirmed to him that he was enrolled in the Plan. *Id.* exs. 11; 41. Mr. Amschwand paid his monthly premium payments directly to Spherion up until his death. *Id.* exs . 15-18, 33-34. It is uncontroverted that Mr. Arnschwand was never informed that, pursuant to the terms of the Policy, his life insurance coverage under the Plan would not take effect until he returned to work for one full day.

After Mr. Amschwand's death, Plaintiff filed a claim for life insurance benefits with Aetna, which Aetna denied on the ground that Mr. Amschwand had not satisfied the Active Work Rule inasmuch as he never returned to work for at least one full day between May 1, 2000, when the Policy became effective, and the date of his death on February 11, 2001. Hence, he never became eligible either for basic or supplemental life insurance coverage under the Policy. *See id.* exs. A-3, A-4. After unsuccessfully challenging the denial of benefits through Aetna's administrative appeals process, Plaintiff filed this action against the Spherion Defendants pursuant to ERISA § 502 (a) (3), 29 U.S.C. § 1132 (a)(1)(3).[5]

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[5] Plaintiff claims for statutory penalties and attorney's fees under ERISA § 502(c) (1) (B) and (g) (1) are not at issue here.

In her Sixth Amended Complaint, Plaintiff alleges that Spherion and the Trustees, as Plan Administrators, breached their fiduciary duties by providing to Plaintiff and her husband false information about the terms and status of his life insurance coverage under the Plan. According to Plaintiff, Defendants affirmatively represented to Mr. Amschwand that his death benefits were in place and would be payable to Plaintiff in the event of his death, but neglected to advise him that his coverage under the Plan would not be effective until he returned to work for one full day. Document No. 104 ¶¶ 47-48, 55-56. In addition, Plaintiff alleges that despite numerous requests, Defendants failed to provide her and her husband with copies of the Plan documents that would have alerted them to the Plan's terms for coverage, including the Active Work Rule. *Id.* ¶¶ 51-53, 58-60. Plaintiff therefore seeks (1) an award of "$426,000 (the value of the life insurance benefits) from Spherion," representing the "monetary losses caused by [the Spherion Defendants'] breach of fiduciary duty"; (2) statutory damages in the amount of $100 per day from the date of Spherion's "failure or refusal to send the documents requested by Plaintiff"; and (3) injunctive relief prohibiting Spherion from "following the express terms of any plan documents which are inconsistent with the affirmative representations Spherion made to the Amschwands about the terms of Mr. Amschwand' s life insurance proceeds." *Id.* ¶¶ 49-51, 57-58. Plaintiff also requests pre- and post-judgment interest, attorney's fees, and costs.

Defendants move for partial summary judgment that money damages are not available under ERISA

§ 502(a)(3), which provides only for "appropriate equitable relief." 29 U. S. C. § 1132(a)(3). In response, Plaintiff cross-moves for partial summary judgment that "equitable relief" within the meaning of ERISA § 502(a)(3) includes recovery from a fiduciary any monetary losses caused by the fiduciary's breach of its duties. Finally, Aetna moves for summary judgment on the Third-Party Complaint on the grounds that it is not liable to Defendants for their alleged misrepresentations and omissions concerning the terms for life insurance coverage under the Plan.

II. *Standard of Review*

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interroga-tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See id.* at 2553-54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514-15 (1986)). "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine'

issue concerning every essential component of its case." *Id.*

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *See Anderson*, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, (5th Cir. 1993) (citing *Matsushita*, 106 S. Ct. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* (citing *Anderson*, 106 S. Ct. at 2511). Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513.

III. *Discussion*

A. *"Appropriate Equitable Relief" Under ERISA § 502(a)(3)*

Section 502(a)(3) of ERISA authorizes a beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate *equitable relief* (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan."

29 U. S. C. § 1132 (a) (3) (emphasis added). According to the Spherion Defendants, the remedies sought by Plaintiff--the value of the life insurance benefits she would have received under the Plan had her husband complied with the Active Work Rule and/or an injunction prohibiting Defendants from applying the Active Work Rule to deny her the proceeds of the insurance policy--are not "equitable relief" and are therefore not recoverable under ERISA § 502(a)(3). *See* Document No. 129 at 4-13.[6]

Although ERISA does not define "equitable relief," the Supreme Court has considered the meaning of the term on two occasions. In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), participants in a qualified pension plan brought suit under ERISA § 502(a)(3) against a non-fiduciary to recover losses resulting from the non-fiduciary's participation in an alleged fiduciary breach. *Mertens*, 113 S. Ct. at 2065-66. The participants attempted to characterize the relief they sought as "equitable relief," but the Court rejected that argument, noting that the participants were not seeking "a remedy traditionally viewed as 'equitable,' such as injunction or restitution." *Id.* at 2068. The Court determined that

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[6] Defendants also argue that ERISA § 502(a) (3) does not provide recovery for the "liquidated damages" Plaintiff mentions in her prayer for relief. *See* Document Nos. 104 at 20; 129 at 13. The only reference in ERISA to "liquidated damages" appears in ERISA § 502(g)(2)(C)(ii), and the Court agrees that this provision does not apply in this suit. *See* 29 U.S.C. § 1132(g)(2)(C)(ii). Plaintiff does, however, assert a claim for *statutory* damages under ERISA § 502(c)(1)(B), and Plaintiff presumably used the term liquidated damages when referring to this claim.

although the participants "often dance around the word, what [they] in fact seek is nothing other than compensatory damages--monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* Because "[m]oney damages are, of course, the classic form of legal relief," the Court held that the participants were not entitled to recover the relief they sought under ERISA § 502(a)(3). *Id.*

The Supreme Court further clarified the meaning of "appropriate equitable relief" in *Great-West Life & Annuity Insurance Company v. Knudson*, 122 S. Ct. 708 (2002). In *Great-West*, the plan administrator brought suit under ERISA § 502(a)(3) to enforce a reimbursement provision in the plan against a plan beneficiary who had received compensatory damages in a lawsuit after being severely injured in a car accident. *Great-West*, 122 S. Ct. at 711.

In rejecting the administrator's claim, the Court reiterated that "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity . . . .'" *Id.* at 712 (quoting *Mertens*, 113 S. Ct. at 2069). Although the administrator requested injunctive relief, the Court concluded that an injunction ordering reimbursement would not constitute "equitable relief" because "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Id.* at 713. The Court also rejected the administrator's request for restitution. The Court distinguished between legal and equitable forms of restitution and explained that in equity, restitution

was available only "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 714. Because the kind of restitution the administrator sought was not "equitable--the imposition of a constructive trust or equitable lien on particular property--but legal--the imposition of personal liability for the benefits" that the administrator had conferred on the beneficiary--the Court concluded that the "suit [was] not authorized by § 502(a)(3)." *Id.* at 715, 717. Finally, the Court expressly rejected the proposition that "the common law of trusts" provided the administrator with equitable remedies that allowed it to bring suit under ERISA § 502(a)(3). *Id.* at 717-18.

The Spherion Defendants argue that *Mertens* and *Great-West* "make clear that only strictly equitable relief is available under 502(a)(3)" and therefore preclude Plaintiff from recovering the proceeds of the life insurance policy under ERISA § 502(a)(3). *See* Document No. 129 at 7. In response, Plaintiff attempts to distinguish *Mertens* and *Great-West* on the grounds that they dealt with claims for monetary relief against *non-fiduciaries*. *See* Document No. 131 at 17-30. According to Plaintiff, "because the relief [she] seeks is against a fiduciary, it was exclusively available in equity and treated as equitable by standard texts on remedies and trusts." *Id.* at 17-18. Thus, Plaintiff argues, the term "equitable relief" includes "the recovery from a fiduciary of any direct monetary losses caused by the fiduciary's breach of its duties." *Id.* at 16. This is precisely the argument that the United States Secretary of Labor advanced, and the Tenth Circuit Court of Appeals rejected, in *Callery*

v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2004).[7]

In Callery, plaintiff purchased life insurance coverage for her husband pursuant to a group insurance policy sponsored by her employer. *Callery*, 392 F.3d at 403. Although she and her husband later divorced, plaintiff continued to pay life insurance premiums for her husband's coverage until his death. *Id.* When plaintiff, as beneficiary, filed a claim for benefits under the plan, however, the insurance company denied coverage based upon a policy exclusion providing for termination of a spouse's eligibility for life insurance upon divorce, but refunded the premiums plaintiff had paid. *Id.* Thereafter, Plaintiff sued her employer under ERISA § 502(a)(3), alleging that the employer breached its fiduciary duties by failing to provide her with a copy of the summary plan description, which would have alerted her to the policy exclusion. *Id.* To remedy the breach, plaintiff sought an order enjoining her employer from not paying the life insurance benefits and/or an order estopping her employer from denying her claim for benefits. *Id.* at 405.

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[7] In fact, as Defendants point out, Plaintiff's motion for summary judgment is almost entirely a verbatim copy of the *amicus curae* brief filed by the Secretary of Labor in *Callery*, altered only by the substitution of Plaintiff's name for Callery's name. *Compare* Document No. 131 at 16-30 *with* Document No. 139 ex. A at 4-23. Nowhere in Plaintiff's motion for summary judgment, however, does she attribute her arguments to the Secretary of Labor's *amicus* brief.

Applying *Mertens* and *Great-West*, the Tenth Circuit concluded that "[t]o the extent [the plaintiff] seeks payment of the policy proceeds, such relief is barred under § 502(a)(3)," and "[t]o the extent she seeks injunctive relief compelling the payment of policy proceeds, [she] has dismissed the insurance company from the case and has not alleged that her situation satisfies the limitations placed upon the grant of injunctive relief in equity." *Id.* The Court explained that the plaintiff's claim "was most accurately construed as one for reliance damages, because she claims that the lack of notice prevented her from obtaining life insurance on her former husband from another source," but stated that "such relief is compensatory and not typically available in equity." *Id.* at 405-06; *see also Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 446 (S.D.N.Y. 2002) ("[W]hat plaintiff seeks is an individualized recovery of at least some part of the [life insurance benefits] he lost because [the employer] did not provide the [insured employee] with complete and accurate information about her life insurance policy. . . . However, there is no equitable remedy available under ERISA § 502(a)(3) that can make plaintiff whole under these circumstances.").

In addition, the Tenth Circuit rejected the position urged by the Secretary of Labor in its amicus brief--"that the limited availability of monetary damages in *Mertens* and *Great-West* is inapplicable in this case because those cases involved contract breaches by non-fiduciaries, rather than a claim against a fiduciary for a fiduciary breach." *Id.* at 408. The Court explained that "[w]hile the arguments of amici that we should look to the common law of trusts

and award monetary damages pursuant to an equitable breach of trust by a fiduciary may have been compelling before *Great-West*, they are not so now," and noted that "other courts have rejected [a] distinction . . . based on the status of the defendant as a fiduciary." *See id.* (citing *Rego v. Westvaco Corp.*, 319 F.3d 140, 144-46 (4th Cir. 2003); *McLeod v. Or. Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996)). Thus, the Tenth Circuit stated, "[t]hough the issue is close, we must adhere to the Supreme Court's rather emphatic guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as 'appropriate equitable relief' under § 502(a)(3) of ERISA." *Callery*, 392 F.3d at 409.

Callery is persuasive for the proposition that monetary damages equal to the benefits a beneficiary would have received but for the fiduciary's breach do not constitute "equitable relief" and are therefore unavailable under ERISA § 502(a)(3). The alleged fiduciary breach by the Spherion Defendants, therefore, does not subject them to liability to Plaintiff for damages measured by the value of the life insurance proceeds not paid by Aetna. Moreover, Plaintiff is not entitled to an order enjoining the Spherion Defendants "from affirmatively relying upon the Active Work Rule" to deny her the proceeds of the Aetna Policy; it was Aetna, not the Spherion Defendants, who determined that the Active Work Rule precluded Plaintiff from receiving benefits under the Plan. Such an injunction, therefore, would have no effect against the Spherion Defendants without an accompanying order requiring them to pay to Plaintiff the disputed life insurance proceeds. This request for

an injunction is simply an indirect attempt to recover from Defendants what she cannot recover directly--the value of the life insurance proceeds. Plaintiff cannot obtain the relief she seeks under ERISA § 502(a)(3), and her § 502(a)(3) claim must therefore be dismissed.[8]

B. *Aetna's Liability to the Spherion Defendants*

Aetna moves for summary judgment on the Third-Party Complaint. In response, Defendants contend that because Plaintiff seeks $426,000 in life insurance benefits, she has brought a claim for benefits under ERISA § 502(a)(1)(B); and although Defendants agree with Aetna that Plaintiff is not entitled to recover these benefits under the express terms of the Plan, to the extent the Court holds that she is entitled to recover these amounts from Defendants, "Defendants would have a claim against Aetna for reimbursement of those fully insured benefits." *See* Document No. 138 at 2-4.[9] The third party action against Aetna is mooted by the summary judgment granted herein for Defendants on Plaintiff's claim. Aetna's motion for summary judgment will therefore be granted.

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[8] Because Plaintiff as a matter of law cannot obtain the relief requested under ERISA § 503(a)(3), her further contention that the Spherion Defendants somehow waived the Active Work Rule contained in Aetna's Policy has no merit.

[9] Plaintiff did not assert a claim for benefits under ERISA § 502(a)(1)(B) but under § 502(a)(3). *See* Document No. 104.

IV. *Order*

For the foregoing reasons, it is

ORDERED that Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion for Partial Summary Judgment (Document No. 127) is GRANTED, and Plaintiff Melissa Amschwand's ERISA § 502(a)(3) claim against the Spherion Defendants is DISMISSED. The Spherion Defendants' Motion to Strike (Document No. 140) is DENIED AS MOOT. It is further

ORDERED that Plaintiff Melissa Amschwand's [Cross] Motion for Partial Summary Judgment (Document No. 131) is DENIED. It is further

ORDERED that Third-Party Defendant Aetna Life Insurance Company's Motion for Summary Judgment on Third-Party Complaint (Document No. 124) is GRANTED, and the Spherion Defendants' Third-Party Complaint is DISMISSED.

Remaining to be tried are Plaintiff's claims for statutory penalties and attorney's fees under ERISA Sections 502(a)(1)(A) and (g)(1).

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 24th day of August, 2005.

/s/

EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20346

[Filed October 18, 2007]

MELISSA AMSCHWAND, individually and on behalf of the Estate of Thomas Amschwand Plaintiff-Appellant	)
v.	)
SPHERION CORP; ET AL Defendants	)
SPHERION CORP, individually and as plan administrator of the group plan life policies 779407-10-001 & 779407-11-001; GROUP PLAN LIFE POLICIES, 779407-10-001 & 779407-11-001; TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN;	)

GROUP LIFE AND ACCIDENTAL)
DEATH AND DISMEMBERMENT)
INSURANCE PLAN)
Defendants-Appellees)
)

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JONES, Chief Judge, and BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/Edith H. Jones
United States Circuit Judge

REHG-2

APPENDIX F

STATUTES

29 U.S.C. § 1132

United States Code Annotated Currentness
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle 8. Regulatory Provisions
Part 5. Administration and Enforcement
§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-.

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), or (8) of subsection (c) of this section or under subsection (i) or (I) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates

subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[10] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan

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[10] So in original. Probably should be "subtitle".

in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), oniy if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by

regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (5) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days

after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary

shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State

law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a

final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial

proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

APPENDIX G

UNITED STATES SUPREME COURT

Case 06-856

LARUE V. DEWOLFF,
BOBERG & ASSOC., INC.

[Certiorari Granted June 18, 2007]

DECISION BELOW:450 F3d 570

LOWER COURT CASE NUMBER: 05-1756

QUESTIONS PRESENTED:

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."

The First Question Presented is:
Does §502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account

in a "defined contribution plan" that were caused by fiduciary breach?[1]

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * to redress * * * violations" of the statute.

The Second Question Presented is:
Does §502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in premerger courts of equity as "surcharge")?[2]

CERT. GRANTED 6/18/2007

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[1] Hereinafter, this will be referred to as the "502(a)(2) Question."

[2] Hereinafter, this will be referred to as the " 502(a)(3) Question."

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(2)

No. 07-841

Supreme Court, U.S.
FILED
JAN 28 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MELISSA AMSCHWAND,

Petitioner,

v.

SPHERION CORPORATION, individually and as plan administrator; TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN; and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1) Should this Court review the Fifth Circuit's holding—which followed the precedent of this Court and every other Circuit—that money damages, in the form of monetary life insurance benefits under a group life insurance contract, are not "appropriate equitable relief" and are therefore not recoverable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents show that the stock of Respondent Spherion Corporation is publicly traded under the symbol SFN. No publicly traded shareholder owns more than 10% of the outstanding stock of Respondent Spherion Corporation.

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ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) ... *passim*

INTRODUCTION

This Court has repeatedly made it clear that not all types of relief are available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3); only "appropriate equitable relief" may be entered. Money damages of the sort sought by Petitioner are a classic form of legal (not equitable) relief and cannot be awarded under 502(a)(3).[1]

Petitioner argues that the rule is different in claims against fiduciaries. Neither the statute nor this Court (nor any other court for that matter) recognizes such a distinction. The dispositive issue for analysis is the nature of the remedy, not the parties to the lawsuit. The rule urged by Petitioner—that make-whole money damages may be awarded if the defendant is a fiduciary—ignores the strictures of 502(a)(3), which have been expressly recognized and enforced by this Court.

Petitioner argues further that a make-whole remedy could be entered by a court in equity against a trustee, even if the resulting money damages remedy was legal (not equitable) in nature, provided the "special conditions attached by equity are satisfied" (Petition at 8). Even if that were true under 502(a)(3), which the Respondents dispute, what Petitioner seeks here is not equitable make-whole. At most courts in

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[1] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is discussed extensively in this brief. To avoid the awkward duplication of the entire parallel citation every time the statute is cited, Respondents will refer simply to "502(a)(3)."

equity had the power to require that a trustee make-whole a trust corpus charged to the trustee's care (what the Petitioner refers to as "maladministration of a trust," Petition at 11). That remedy is provided by ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), so there is no need to provide the remedy again under 502(a)(3).

Further, that is not the remedy Petitioner seeks here. Petitioner does not seek to redress damage to a trust. Instead, she seeks traditional legal relief in the form of contract damages, representing the moneys she claims as benefits under the various group life insurance contracts. Petitioner has already been made whole: all premiums were refunded. Now she seeks something more than and different from make-whole: she seeks consequential money damages.

STATEMENT OF THE CASE

Petitioner filed her original complaint against Spherion Corporation, several group life insurance contracts, and an insurance company. At that time, Petitioner sought money damages (life insurance benefits) under an unjust enrichment theory, pursuant to a request for an injunction, and under a breach of contract theory.

In the ensuing two years, Petitioner filed six additional amended complaints. Through the course of these amendments, certain claims changed, and Petitioner added and subtracted various parties from the lawsuit. One thing never changed, however: the relief she sought. Then and now, Petitioner seeks to recover money damages, namely, the benefits she claims under the group life insurance contracts.

This matter was decided by the trial court on summary judgment on a very narrow legal issue: whether the relief sought by Petitioner could be awarded under 502(a)(3). The facts urged by Petitioner are not material to this legal issue, and the trial court did not make findings of fact. Specifically, the trial court did not make a finding that the Respondents were fiduciaries or that any of the Respondents breached any fiduciary duty to Petitioner, nor did the trial court determine that the damages Petitioner claims (the life insurance benefits) were proximately caused by Respondents' alleged fiduciary violations.

The Respondents take issue with many of the facts outlined by Petitioner.[2] Further, Petitioner's statement of facts is incomplete. Those additional facts are not relevant to this appeal, however. For this reason, although the Respondents do not concede or concur with Petitioner's statement of facts, the Respondents will not outline all of the other facts that would be relevant in the event this matter were tried on the merits.

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[2] For example, Petitioner argues that "[i]t is undisputed that had Mr. Amschwand been aware of the Active Work Rule he could and would have complied with it." (Petition at 3). At the time in question, Mr. Amschwand was on permanent and total disability. Mr. Amschwand could not have complied with the Active Work Rule because he was not medically fit to return to work. Further, he had stated in disability claim papers that he was totally and permanently disabled and therefore unable to work. Petitioner's statement is not "undisputed."

REASONS TO DENY THE WRIT PETITION

I. There is no split in the Circuits or other disagreement regarding the law governing this action.

The law governing the action below is well settled, both by this Court and by decisions in almost every Circuit. There is no split in the Circuits, and there is no disagreement in the lower Courts regarding the governing law. .

The Fifth Circuit expressly recognized this in its opinion:

- "Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 . . . (2002), we must deny relief."

- "Amschwand's proposed distinction among defendants has been rejected by many of our sister circuits. There is no textual argument for drawing this distinction under § 502(a)(3)."

- "[W]e are obliged to follow the Supreme Court's decision in *Great-West* and deny § 502(a)(3) relief."

Amschwand v. Spherion Corp., 505 F.3d 342, 343, 347, 348 (5th Cir. 2007).

II. The law governing the instant action — as previously articulated by this Court — is clear and requires no refinement or explanation.

A. *Mertens* does not permit make-whole relief against a fiduciary under 502(a)(3).

In *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), participants sought money damages from the plan's actuaries in order to recoup benefits they lost due to the actuaries' participation in an alleged fiduciary breach. *Id.* at 250. Although the participants attempted to characterize the claim as equitable under 502(a)(3), this Court recognized that the plaintiffs were not seeking "a remedy traditionally viewed as 'equitable,' such as injunction or restitution." *Id.* at 255. To the contrary, they were seeking "nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* (emphasis in original). This Court concluded that "[m]oney damages are, of course, the classic form of *legal* relief," which is not available under 502(a)(3). *Id.* (emphasis in original).

The participants in *Mertens* argued that the Court's "reading of 'equitable relief' fails to acknowledge ERISA's roots in the common law of trusts." *Id.* (citation omitted). The Solicitor General argued further that since courts of equity could award all types of relief to beneficiaries in an action resulting from a breach of fiduciary duty, all such relief was by definition equitable, *i.e.*, relief entered by a court of equity. *Id.* at 256.

This Court rejected the argument. The Court acknowledged that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). The Court acknowledged further that "money damages were available in those courts against the trustee." *Id.* (citations omitted). The Court rejected the argument, however, that all such remedies were therefore equitable merely because they could be imposed by a court of equity:

> "[W]e think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*. We will not read the statute to render the modifier superfluous."

Id. at 257-58 (emphasis in original).

Mertens did not turn upon the identity of the defendant. *Mertens* expressly rejected the argument that the result should turn upon whether the claim could have been brought or the relief could have been imposed in a court of equity in the days of the divided bench.

The sole issue for analysis is the nature of the remedy. The *Mertens* plaintiffs sought to benefit the plan; Petitioner seeks a personal recovery. The remedy sought by Petitioner is otherwise indistinguishable from the remedy sought (and

rejected) in *Mertens*: Petitioner seeks money damages — life insurance benefits under the group life insurance contracts.

B. Petitioner cannot satisfy the two prong test articulated in *Great-West*.

Petitioner ignores the two step test articulated in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The Court outlined a two (not one) part test: "whether [a remedy] is legal or equitable depends on 'the basis for [the plaintiff's] claim' **AND** the nature of the underlying remedies sought." *Id.* at 213 (emphasis added). Petitioner would have to satisfy **BOTH** parts of the test in order to recover under 502(a)(3). *Id.*; *accord Sereboff v. Mid Atl. Med. Serv., Inc.*, 547 U.S. 356, 126 S. Ct. 1869, 1874 (2006).

Petitioner cannot satisfy either prong of the test. The nature of her underlying claim is breach of contract. Specifically, as demonstrated in her complaint and six amendments, throughout this lawsuit she has sought contract damages under the various group life insurance contracts and against the various group life insurance carriers. The nature of the remedy sought is likewise legal, not equitable. Petitioner seeks money damages, and "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens*, 508 U.S. at 255. Since both the underlying action and the remedy sought are legal, not equitable, Petitioner cannot recover under 502(a)(3).

C. The alternative remedial framework urged by Petitioner violates the strictures of *Mertens* and *Great-West*.

Petitioner seeks to avoid the prior rulings of this Court by arguing that the remedy she seeks may be considered equitable "if law and equity attach different conditions to the remedy and the special conditions attached by equity are satisfied." (Petition at 8). Petitioner fails to specify any such special conditions and fails to demonstrate how such conditions have any roots in the remedies typically available at equity. Further, Petitioner applies its newly constructed framework in a manner that turns *Great-West* on its head.

The only "conditions" identified by Petitioner are that monetary relief should be available "to make whole damage to a beneficiary arising out of the maladministration of a trust, that is, out of the trustee's breach of fiduciary duties, an equitable remedy occasionally within the expanding jurisdiction of the law courts, but still an *equitable* remedy." (Petition at 11). Petitioner is arguing that monetary relief, or presumably any other remedy, is available to make whole a beneficiary in a suit for breach of fiduciary duty. This is precisely the argument that was rejected in *Mertens*, 508 U.S. at 257-58.

Petitioner mistakenly assumes that "maladministration of a trust" is synonymous with "breach of fiduciary duties." As discussed in the next section of this brief, both ERISA and courts at equity provide remedies for maladministration of trusts. *Mertens* makes clear however, that those same

remedies do not extend to any and all actions for breach of fiduciary duty.

Petitioner suggests her proposed framework does no violence to *Mertens* because her focus is not whether "the monetary relief she seeks would be available in *some* case," but is instead whether "it would be available in *her* case, if brought in an equity court in the days of the divided bench." (Petition at 12). *Mertens*, however, stated precisely the opposite: the focus is not on whether the remedy might have been available to a particular beneficiary in the days of the divided bench, but instead on whether the remedy was *typically* available. *Id.*; *Great-West*, 534 U.S. at 219.

III. The supposed make-whole remedy sought by Petitioner was not available even in courts of equity.

A. The remedy sought by Petitioner is not equitable make-whole as that limited concept was recognized in the days of the divided bench.

Petitioner argues that ERISA is based upon historical trust law, that trust beneficiaries could obtain make-whole relief against a trustee in a court of equity, and that she is therefore entitled to make-whole relief here. The flaw in this argument is Petitioner's assumption that "maladministration of a trust" is the equivalent of a "trustee's breach of fiduciary duties," which of course it is not. (Petition at 11).

The historical make-whole remedy on which Petitioner relies was a duty to make the trust corpus whole, and thus only indirectly to make the trust beneficiaries whole, in the event the trustee mismanaged (or "maladministered") the trust. In the absence of some fiduciary breach harming the trust corpus, the trust beneficiaries did not have a separate make-whole remedy against the trustee personally.

There is no suggestion here that the Respondents mismanaged trust assets or caused any loss to trust corpus. There is not even a trust, and Petitioner is certainly not the beneficiary of any trust. Therefore there can be no make-whole. Thus, even if make-whole relief were available under 502(a)(3), which it is not, Petitioner would still not be entitled to recover money damages for the benefits she claims under the group life insurance contracts.

Petitioner argues that money damages can be awarded under 502(a)(3) "to cure the maladministration of a trust." (Petition at 9). In the event of damages to a trust caused by maladministration, ERISA already provides a remedy under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Likewise, ERISA already provides a remedy under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), in the event a "trustee is under a duty to pay money immediately and unconditionally." (Petition at 10). No catchall remedy under 502(a)(3) is required or permitted.

B. Petitioner seeks more than make-whole.

Petitioner admits that all premiums were refunded. Thus, Petitioner has already been made-whole. Further, she has no claim for equitable restitution. Now, Petitioner wants "make-whole plus some more." She wants what is essentially legal restitution, which is not available under 502(a)(3).

IV. The Fifth Circuit's ruling was required by the express statutory language and requirements of 502(a)(3).

Petitioner argues that 502(a)(3) offers a broader array of relief against fiduciary defendants than against non-fiduciary defendants. The express language of the statute on its face demonstrates the fallacy of this argument, as the Fifth Circuit itself recognized. *Amschwand*, 505 F.3d at 347.

ERISA § 502(a)(3) provides that a

> "civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

Thus, 502(a)(3) on its face defines who may bring an action. In contrast, it nowhere provides that the

nature of the remedy it affords depends on the status or identity of the defendant.

By contrast, the same is not true of other provisions of ERISA. For example, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides relief solely against fiduciary defendants; it provides no remedy whatsoever against non-fiduciary defendants. The statute on its face makes a clear distinction between the remedies available against a fiduciary versus the remedies available against non-fiduciaries (unlike 502(a)(3)).

Expanding the scope of equitable relief under 502(a)(3) with respect to claims against fiduciaries would also put 502(a)(3) at odds with other provisions of ERISA that recognize the distinction between legal and equitable relief. This Court addressed this precise issue in *Mertens*, 508 U.S. at 257-58. In *Mertens*, this Court rejected the very argument now urged by Petitioner that the range of "equitable relief" under 502(a)(3) against a fiduciary is broader than the range of such relief against a non-fiduciary. The *Mertens* Court recognized that adopting the approach urged by Petitioner

> "would also require us either to give the term [equitable relief] a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between 'equitable' and 'remedial' relief in § 409(a), [29 U.S.C. § 1109(a),] and between 'equitable' and 'legal' relief in the very same section of ERISA, see [§ 502(g)(2)(E),] 29 U.S.C. § 1132(g)(2)(E); in the same subchapter of ERISA, see [§ 104(a)(5)(C), 29 U.S.C.] § 1024(a)(5)(C); and

> in the ERISA subchapter dealing with the PBGC, see [§§ 4003(e)(1), 4301(a)(1), 29 U.S.C.] §§ 1303(e)(1), 1451(a)(1). Neither option is acceptable."

Id. at 258-59.

In summary, in drafting 502(a)(3), Congress chose not to make a distinction between relief available against a fiduciary versus relief available against a non-fiduciary, in contrast to other provisions of ERISA. Further, in 502(a)(3) Congress conditioned relief based upon the identity of the plaintiff, but did not condition relief based upon the identity of the defendants. The "carefully integrated civil enforcement provision found in ERISA § 502(a) of the statute as finally enacted . . . provide[s] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

V. This Court's decision to grant certiorari in *LaRue* is not relevant to, and provides no basis for granting, the instant petition.

Petitioner argues that this Court's decision to grant certiorari in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 127 S. Ct. 2971 (2007), suggests that the Court desires to "address the availability of make-whole relief under [502(a)(3)]." (Petition at 12-13). The focus of *LaRue* was an issue involving remedies under ERISA

§ 502(a)(2), 29 U.S.C. § 1132(a)(2).[3] As demonstrated during oral argument, the case may also impact the scope of remedies under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The remedy issue under 502(a)(3) was at best a secondary issue thrown in as an afterthought.

The remedy issue under 502(a)(3) is well settled in this Court. The Court's granting certiorari in *LaRue* does not imply that the Court has any interest in revisiting the issue yet again.

CONCLUSION

Petitioner seeks money damages. In order to avoid the prior holdings of this Court, Petitioner argues that she seeks equitable make-whole relief, not legal make-whole relief. In support of this position, however, Petitioner falls back on the arguments urged and rejected as early as *Mertens*. The mere fact that Petitioner seeks a remedy against a fiduciary is not sufficient to transform a legal remedy to one "typically available in equity."

The Fifth Circuit correctly applied the teachings of this Court. Respondents respectfully submit that this Court should deny the petition for a writ of certiorari.

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[3] Petitioners inaccurately state that the first question presented in *LaRue* was whether "502(a)(3) [sic] of ERISA permit[ted] a participant to bring an action to recover losses . . . ." (Petition at 12-13).

Respectfully submitted,

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In the Supreme Court of the United States

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND,
PETITIONER,

v.

SPHERION CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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ARGUMENT

The Government claims that the Question Presented has "divided the courts of appeals" and that certiorari should be granted "to eliminate [this] confusion." USBr.7-8. There is no division among the courts of appeals and no confusion about the law. Far from being "divided," every single federal circuit that has addressed this issue has uniformly agreed with the Fifth Circuit *without dissent*. To have such unanimity in result and reasoning from over two dozen jurists is rare and is a testament to the clarity of this Court's holdings in *Mertens v. Hewitt Associates, Great-West Life & Annuity Insurance Co. v. Knudson,* and *Sereboff v. Mid Atlantic Medical Services, Inc.*

The Government strains to portray a conflict by pointing to a single Seventh Circuit case addressing *restitution*, a case that does not survive *Great-West*. It stretches even further by relying on other pre-*Great-West* decisions that raise a distinct jury trial issue *not* presented in this case and that, in any event, fail to reveal any genuine conflict regarding the money damages remedy Petitioner seeks here. Bare assertions of confusion aside, a grant of certiorari in this case could only confirm (or upset) the uniform application of settled law that has persisted in the courts of appeals for the last six years.

The interpretation the Government advocates here is nothing new. It is only a slight variation of the position the Solicitor General advocated unsuccessfully in *Mertens*, and it has been argued almost verbatim by the Department of Labor in an *amicus* capacity to nearly every circuit. The Government's argument has been soundly rejected,

for good reason. *Mertens* clearly holds that the compensatory money damages sought by Petitioner are not "appropriate equitable relief" available under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) (hereinafter §502(a)(3)) because they were not the type of remedy "typically" available in a court of equity. Moreover, while courts of equity had jurisdiction over actions against trustees for breach of trust, and in such actions could impose surcharge or make-whole relief to redress harm to the trust corpus caused by the trustee's maladministration or self-dealing, this case does not involve a fiduciary breach affecting the assets of a trust (or plan). The Government's argument thus fails both under this Court's precedent and on the facts of this case.

Ultimately, the Government is asking this Court to grant the petition not because the Fifth Circuit's opinion conflicts with the decisions of this Court or other courts (it does not), but because the Government believes the absence of a money-damages remedy for suits against fiduciaries by individual health and welfare plan beneficiaries is unjust. The Government protests that "Congress could not have intended [this result] when it enacted ERISA." USBr.7-8. But even Congress has repeatedly rejected that argument. After *Mertens* and again after *Great-West*, Congress declined invitations to amend §502(a)(3) to provide precisely the sort of monetary relief Petitioner seeks. The Government now appeals to the wrong forum. This Court should not intervene to rewrite the statute in Congress' stead.

I. LOWER COURTS HAVE UNIFORMLY HELD THAT ERISA §502(a)(3) DOES NOT AUTHORIZE THE ACTION AT ISSUE HERE.

The decision below does not "deepen[] an existing conflict among the courts of appeals." USBr.15. None exists. As the Government concedes, and its lengthy string cite reveals, nearly every circuit court has addressed the Question Presented. *Id.* And every circuit considering the issue has "concluded that this Court's cases dictate the conclusion that Section 502(a)(3) does not authorize suits against an ERISA fiduciary for monetary redress of losses caused by a breach of fiduciary duty." *Id.*

The Government's purported conflict consists of a single, eight-year-old case from the Seventh Circuit—decided before *Great-West*. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). As the Government acknowledges, the Seventh Circuit in that case held only that Petitioner was entitled to "the equitable remedy of restitution," *id.* at 592, and, in so holding, relied in part on the since-discredited decision in *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999). *See Pereira v. Farace*, 413 F.3d 330, 339-40 (2d Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006). The Government intimates that the *Bowerman* court may have wrongly "denominated" the remedy as "restitution." USBr.16 n.6. To the extent that is true, it only highlights what many courts have since recognized—*Bowerman* did not survive *Great-West*. *See, e.g., Callery v. U.S. Life Ins. Co. in City of N.Y.*, 392 F.3d 401, 408-09 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005) (noting that courts have "questioned" *Bowerman*'s "continuing validity in light of" *Great-*

West). *McDonald v. Household Int'l, Inc.*, 425 F.3d 424 (7th Cir. 2005), does not resuscitate *Bowerman*; it does not even cite it.

Without any true circuit split on the actual Question Presented, the Government strains to identify some "related" conflict by pointing to Seventh Amendment cases involving the right to a jury trial for claims of fiduciary breach.[1] USBr.16. The purported confusion arises, the Government says, because some courts have concluded that claims for "monetary relief" brought under §502(a)(2) or (a)(3) or in non-ERISA fiduciary breach cases are "equitable" and thus do not confer a right to a jury trial, while others conclude claims are "legal" and therefore entitle parties to a trial by jury.

Of the seven cases purportedly holding that "monetary relief" is equitable in the fiduciary breach context (under ERISA or otherwise), all but one were decided before *Great-West*.[2] The one case that post-dates *Great-West*, *Phelps v. C.T. Enters., Inc.*, 394 F.3d 213 (4th Cir. 2005), stands only for the unobjectionable proposition that a §502(a)(3) claim is "equitable" and does not give rise to a jury trial right. It does not suggest, let alone hold, that money

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[1] At the outset, this is not a conflict "among the courts of appeals." USBr.16. The cases upon which the Government relies largely come from federal district or state courts.

[2] Indeed, two of the cases the Government puts on the other side of the split recognize that the earlier cases are no longer good law. *See Ellis v. Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367, at *3-4 (W.D. Mich. Apr. 2, 2007); *Bona v. Barasch*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003). Intervening Supreme Court authority cannot, of course, create a circuit split.

damages are available under that subsection. *Id.* at 222 n.5.

The Government also fails to note that the types of "monetary relief" at issue in most of these cases were *not* the sort of compensatory damages Petitioner seeks here. *See, e.g., Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994) (restitution); *In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985) (accounting); *Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va.*, 876 F. Supp. 809, 816-17 (E.D. Va. 1995) (injunctive relief and restitution); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 321-22 (E.D.N.Y. 1981) (restitution and accounting); *Uselman v. Uselman*, 464 N.W.2d 130, 137 (Minn. 1990) (reimbursement of trust corpus).

Far from revealing confusion among the courts, this supposed, tangential split further demonstrates that, since this Court clarified the applicable law in *Great-West*, lower courts have faithfully and consistently rejected the position urged by Petitioner and the Government. They have not done so blindly. Participating as *amicus* in nearly every circuit, the Department of Labor made the very same merits arguments, almost verbatim, that the Government advocates here. And after reviewing this Court's decisions in *Mertens*, *Great-West*, and (for the more recent cases) *Sereboff*, every single appellate jurist to decide the issue has rejected the Government's position.

II. THE GOVERNMENT'S MERITS ARGUMENT FAILS UNDER THIS COURT'S PRECEDENTS AND ON THE FACTS OF THIS CASE.

In arguing that the Fifth Circuit (and nearly every other appellate court in this country) got it wrong, the Government largely ignores *Mertens*. The silence is deafening.

The Government's argument has changed little since it was first rejected in *Mertens*. Fifteen years ago, the Government argued that compensatory damages could be recovered against a trustee because "such relief traditionally has been obtained in courts of equity and therefore is, by definition, equitable relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (internal quotation marks and citation omitted); *see also id.* (arguing further that equitable relief includes "whatever relief a court of equity is empowered to provide in the particular case at issue"). This Court flatly rejected the Government's position and concluded that, for purposes of §502(a)(3), "equitable relief" means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256-57 (emphasis in original).

The Government seeks to dispense with *Mertens* in seven short lines by observing that it addressed the liability of a *non-fiduciary*. USBr.9. *Mertens*, however, analyzed the meaning of §502(a)(3) without regard to the non-fiduciary status of the particular defendant in that case. This Court acknowledged that in the days of the divided bench courts of equity could provide make-whole relief for breach of trust by a trustee, but it concluded that Congress did not

intend to define "appropriate equitable relief" so broadly:

> Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under §502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

508 U.S. at 257-58 (footnote omitted). Likewise, this Court's analysis of ERISA's express statutory language demonstrates that the nature of the remedy, not the identity of the parties, is controlling. *Id.* at 258-59.

But even if this Court were to ignore *Mertens* and adopt the Government's analytical approach, it still would not find §502(a)(3) relief available on the undisputed facts of this case. This Court applies a two-prong test to determine whether §502(a)(3) relief is available, examining first the nature of the cause of action and then the remedy sought. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 365 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-14 (2002). Neither prong is satisfied here.

The Government argues that courts of equity had exclusive jurisdiction over causes of action for breach of trust against trustees. USBr.11. But this case involves neither a "trustee" nor a "breach of trust" (as that term was used in the days of the divided bench). Petitioner complains of various alleged breaches of fiduciary duty by Spherion Corporation. USBr.4. Regardless of whether Spherion was a

fiduciary, it indisputably was *not* a trustee, and none of the allegations in this case relate to damage to a trust corpus (or, for that matter, plan assets). The Government could prevail on its own terms only if courts of equity had exclusive jurisdiction over *all* causes of actions against *any* fiduciary. Even the Government does not make that claim.

The Government's position also fails under the second prong. The specific remedy urged by the Government—whether it be characterized as "make-whole relief" or "surcharge"—was not "typically" available in a court of equity where (as here) there is no harm to the trust corpus resulting from a breach of trust by a trustee. [3]

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[3] Without exception, all of the cases and commentaries cited by the Government (USBr.11-14) relate solely to relief in the event of harm to, or self-dealing with, the trust corpus (or by analogy assets of an estate or corporation) by the trustee (or by analogy an executor or corporate director/officer) charged with its care. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) (transferee with knowledge of circumstances rendering transfer breach of trust remains liable for trust corpus); *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983) (Government, assuming control over Indians' property, was liable as trustee for damage to trust corpus); *United States v. Mason*, 412 U.S. 391, 398 (1973) (Government liable for paying doubtful tax claim that improperly diminished value of trust corpus); *Mosser v. Darrow*, 341 U.S. 267 (1951) (trustee allowing self-dealing with corporation's stock liable for resulting profits); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 464 (1939) (court can surcharge trustee for losses to trust corpus); *Kendall v. DeForest*, 101 F. 167, 169 (2d Cir. 1900) (trustee "acted at his peril" by allowing depletion of trust corpus); *Bosworth v. Allen*, 61 N.E. 163, 165 (N.Y. 1901) (corporate officers/directors liable for improper disposition of corporate assets); *Gates v. Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (surcharge for losses from

ERISA codifies that principle by providing for monetary relief for injury to a plan at ERISA §§409 and 502(a)(2), 29 U.S.C. §§1109 and 1132(a)(2). Under those provisions, a fiduciary is "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." This is precisely the make-whole or surcharge remedy urged by the Government—but it is available only to redress harm to the plan itself. Congress' failure to provide for compensatory

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investment of trust corpus); *Appeal of Harrisburg Nat'l Bank*, 84 Pa. 380 (1877) (surcharge against administrator for improperly paying out or negligently losing estate assets); *Marriott v. Kinnersley*, 48 Eng. Rep. 187 (High Ct. Ch. 1830) (trust corpus included insurance policy; trustees failed to preserve trust corpus by discontinuing premium payments and by delivering sale proceeds to co-trustee who became insolvent); Restatement (Third) of Trusts §205 & cmt. a, at 223 (1992) (trustee "chargeable with the amount required to restore the values of the trust estate"); Restatement (Second) of Trusts §205, at 458 (1959) (breaching trustee liable for resulting loss or lost profits to trust corpus); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §862, at 36-39 (rev. 2d ed. 1995) (trustee may be surcharged for loss to trust corpus resulting from various forms of negligence or misconduct); 3 John N. Pomeroy, *A Treatise on Equity Jurisprudence* §1080, at 2481 (4th ed. 1918) ("trustee incurs a personal liability for a breach of trust . . . whenever the trust property has been lost or put beyond [the beneficiary's] reach by the trustee's wrongful act"); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §205, at 238-39 (4th ed. 1987) ("if a breach of trust results in loss to the trust estate, the trustee is chargeable with the amount of the loss"); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§1268-78, at 519-34 (12th ed. 1877) (discussing trustee liability for breach of trust with respect to preservation and care of trust corpus).

monetary relief absent harm to a plan is consistent with the absence of such extraordinary relief in analogous circumstances in traditional courts of equity, and the concept of "appropriate equitable relief" in §502(a)(3) should not be distorted to provide a remedy Congress omitted.

In sum, *Mertens* squarely held that money damages, however denominated, are not the sort of typical equitable relief that is available under §502(a)(3). And even if this Court were to abandon that holding in favor of the Government's species-of-defendant analysis, such relief was available in equity only against trustee (or quasi-trustee) fiduciaries to redress harm to a trust (or quasi-trust) corpus; equity provided no such remedy (and indeed no cause of action) in circumstances analogous to those presented in this case.

III. THE GOVERNMENT SEEKS REDRESS FOR THE PERCEIVED INEQUITIES OF ERISA'S STATUTORY SCHEME FROM THE WRONG FORUM.

Ultimately, the Government urges this Court to grant the petition because it believes the absence of money damages in cases like this one is unfair. The Government appeals to ERISA's broad statutory purpose but forgets this Court's frequent reminder that ERISA is a "carefully crafted and detailed enforcement scheme" that "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 254, 262; *see also Great-West*, 534 U.S. at 209; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

The Government's assertion that "Congress could not have intended" to deprive persons like Petitioner of a "meaningful remedy," USBr.18, rings particularly hollow here. "Vague notions" of ERISA's purpose, *Great-West*, 534 U.S. at 220, cannot withstand the tangible evidence of how Congress has *in fact* reacted to the precise issues the Government perceives. Three weeks after *Mertens* was decided, an amendment to §502(a)(3) was introduced in the Senate to "provide participants and beneficiaries the full economic value of any benefits they would have received absent such violations." Omnibus Budget Reconciliation Act of 1993, S. 1134, 103d Cong. §12312(a). It was never adopted. And three weeks after this Court decided *Great-West*, an amendment was proposed in the House that would have modified §502(a)(3) to provide for "such additional relief as a court of equity might have awarded in a case involving the enforcement or administration of a trust." Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. §403(c). An identical amendment was proposed in the Senate two months later. INFORM Act of 2002, S. 2032, 107th Cong. §403(c). Neither amendment was adopted.

Despite the Government's plea that Congress could not have intended to deprive plaintiffs like Petitioner the equivalent of money damages, in the wake of *Mertens* and *Great-West*, Congress has repeatedly resisted calls to amend §502(a)(3) to provide such relief. To the extent jurists, legal scholars, or the Department of Labor are dissatisfied with ERISA as it stands, their appropriate recourse is a renewed appeal to Congress—not to this Court in Congress' stead. The Government's displeasure

with the law affords no reason to disturb the reasoned judgment of the Fifth Circuit.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 07-841 05-23-08

In the Supreme Court of the United States

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND, PETITIONER

v.

SPHERION CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an action by a plan beneficiary against a plan fiduciary for monetary relief equal to the insurance benefits that the beneficiary would have received absent the fiduciary's breach of fiduciary duty seeks "equitable relief" within the meaning of Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(3).

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In the Supreme Court of the United States

No. 07-841

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND, PETITIONER

v.

SPHERION CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, to ensure "the continued well-being and security of millions of employees and their dependents" who are participants in or beneficiaries of employee benefit plans. 29 U.S.C. 1001(a). To that end, ERISA imposes stringent duties on plan fiduciaries, 29 U.S.C. 1104 (2000 & Supp. IV 2004), and provides several "carefully integrated" remedial provisions to enforce those duties.

Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134, 146 (1985); see 29 U.S.C. 1001(b). This case concerns one of those provisions, ERISA Section 502(a)(3), which allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3).

2. Thomas Amschwand was employed by respondent Spherion Corporation, formerly known as Interim Services, Inc. (Spherion). Amschwand was a participant in Spherion's Group Life and Accidental Death and Dismemberment Insurance Plan (the plan), an ERISA-covered welfare plan. Spherion was the plan administrator and an ERISA fiduciary. Amschwand diligently sought to provide for his wife under the plan, and Spherion repeatedly assured him that he had succeeded. Thus, at the time he died in February 2001, Amschwand thought he had obtained $426,000 in life insurance benefits for his wife. As it turned out, however, that was not the case. Pet. App. 4a, 27a-29a, 31a; Sixth Am. Compl. 2, 4; R. 1883; AMS272.

In August 1999, Amschwand was diagnosed with a rare form of heart cancer and took leave from his job. While he was on leave, Spherion changed life insurance carriers and purchased a new group policy from Aetna Life Insurance Company. Amschwand elected a total of $426,000 in basic and supplemental coverage under the new policy. Spherion confirmed that Amschwand was enrolled under the new policy. Pet. App. 2a-4a, 29a-30a.

Amschwand wrote checks to Spherion to cover the cost of his life insurance. Spherion cashed the checks, depositing them into an account in the name of the Interim/PPA Health Benefits Trust. Spherion paid monthly premiums to Aetna on the group life insurance

policy, which was held in Spherion's name. Pet. App. 4a, 29a-30a; Sixth Am. Compl. 4, 6; Spherion Answer to Sixth Am. Compl. 4, 5; R. 950, 1539, 1566-1567, 1881, 2077-2093, 2494-2495; MDPROD1358-1359.

Unbeknownst to Amschwand, however, the Aetna policy contained a provision denominated the "Active Work Rule." That provision stated:

> If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day.

Pet. App. 3a, 29a. Although Aetna agreed to waive the Rule for employees identified by Spherion who were on leave on the effective date of the new group policy, Spherion did not provide Amschwand's name to Aetna. Spherion also never informed Amschwand about the Active Work Rule. And, despite Amschwand's repeated requests for the summary of coverage under the policy or other documentation of his coverage, Spherion failed to provide Amschwand with the summary, which described the Active Work Rule. Instead, Spherion repeatedly informed Amschwand that he was covered at the levels that he had elected. *Id.* at 3a-4a, 29a-30a.

After Amschwand's death, petitioner, who is his widow, filed a claim for the life insurance benefits with Aetna. Aetna denied the claim on the ground that Amschwand was ineligible for the benefits under the Active Work Rule because he had not returned to work for a full day after the policy became effective. Aetna affirmed the denial of benefits on administrative appeal. Pet. App. 5a, 30a; R. 2494-2495.

Petitioner then filed suit under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), against Spherion, the Trustees of the Interim Health Benefits Trust, and the plan. As relevant here, petitioner alleges that Spherion breached its fiduciary duties under ERISA by failing to provide the appropriate paperwork to Aetna to obtain a waiver of the Active Work Rule for Amschwand, failing to provide him with the plan documents that he requested, failing to inform him about the Active Work Rule, and misrepresenting that he was fully covered under the Aetna policy. Sixth Am. Compl. 3-17.

Petitioner seeks to recover from Spherion "all monetary losses caused by its breach of fiduciary duty," specifically "the value of the life insurance benefits" that she would have received but for the breach. Sixth Am. Compl. 16. Alternatively, she seeks an order enjoining Spherion and the other respondents from denying the benefits based on the Active Work Rule. *Ibid.*; see Pet. App. 31a.

3. The district court granted summary judgment for respondents on the Section 502(a)(3) claim. Pet. App. 27a-42a. The court reasoned that *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), foreclose petitioner's suit. Pet. App. 34a-40a. In reaching that conclusion, the district court relied heavily on the Tenth Circuit's decision in *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401 (2004), cert. denied, 546 U.S. 812 (2005). The district court concluded that "*Callery* is persuasive for the proposition that monetary damages equal to the benefits a beneficiary would have received but for the fiduciary's breach do not constitute 'equitable relief' and are therefore unavailable under ERISA § 502(a)(3)." Pet. App. 39a. Moreover, the district court

reasoned, "an injunction is simply an indirect attempt to recover from [respondents] what [petitioner] cannot recover directly—the value of the life insurance proceeds." *Id.* at 40a. The court therefore dismissed petitioner's Section 502(a)(3) claim. *Ibid.*[1]

4. The court of appeals affirmed. Pet. App. 1a-14a. It observed that "[t]he scope and nature of relief available to aggrieved parties under [Section 502(a)(3)] has been circumscribed by a line of [this Court's] decisions beginning with *Mertens*." *Id.* at 6a. The court of appeals explained that *Mertens* held that "equitable relief" under Section 502(a)(3) encompasses only relief "*typically* available in equity," and that Section 502(a)(3) therefore does not authorize a suit for monetary damages against a non-fiduciary who provides services to a plan. *Id.* at 6a-7a (quoting *Mertens*, 508 U.S. at 256). The court of appeals read *Mertens* to hold that "consequential damages [are] a legal rather than equitable remedy" and thus are unavailable under Section 502(a)(3), "[d]espite the fact that monetary damages were among the remedies historically granted by pre-fusion equity courts in actions brought by a beneficiary against a trustee." *Id.* at 6a. The court reasoned that "[t]he spectrum of § 502(a)(3) relief contracted further" in *Great-West*. *Id.* at 7a. It read *Great-West* as adding a "second requirement" to the *Mertens* requirement that the nature of the relief being sought must be "typically" available in equity—"that the cause of action giving rise

[1] The court did not dismiss petitioner's claim for statutory penalties under ERISA Section 502(a)(1)(A) and (c)(1)(B), 29 U.S.C. 1132(a)(1)(A) and (c)(1)(B), based on respondents' failure to produce plan documents, and for attorney's fees and costs under ERISA Section 502(g)(1), 29 U.S.C. 1132(g)(1)). Pet. App. 41a. The court later awarded petitioner $78,840 plus interest in penalties, fees, and costs. *Id.* at 16a, 18a-25a.

to the claim be generically equitable as well." *Id.* at 8a. That "two-part equity test," the court of appeals stated, was recently reinforced by *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Pet. App. 8a-9a. The court of appeals additionally observed that "*Sereboff* seems to confirm that the *sine qua non* of restitutionary recovery available under § 502(a)(3) is a defendant's possession of the disputed res." *Ibid.*

The court of appeals then rejected petitioner's contention that the relief she seeks is equitable because Spherion is a fiduciary, whereas in *Mertens* and *Great-West*, the plaintiffs sought monetary relief from non-fiduciaries. Pet. App. 9a-10a. In the court's view, "[u]nder *Great-West*, only the nature of the claim and the relief sought—not the status of the litigants—determine the scope of available § 502(a)(3) recovery." *Id.* at 10a. Therefore, the court of appeals concluded, it "is irrelevant to ERISA's remedial scheme" that "wider relief was traditionally available in equity courts against fiduciaries." *Id.* at 10a-11a.

Viewing the remedy that petitioner seeks as restitution, the court of appeals held that the requested relief does not qualify as "equitable" because "Spherion never maintained possession of Amschwand's insurance proceeds." Pet. App. 11a-12a. "[I]f Spherion breached its fiduciary duty," the court reasoned, "the appropriate equitable remedy is the disgorgement of Spherion's ill-gotten profits, *i.e.*, refund of the policy premiums." *Id.* at 12a-13a. But an award of "the lost policy proceeds," the court concluded, "is simply a form of make-whole damage[s]" "akin to" legal relief. *Id.* at 13a. Likewise, the court held, petitioner's request for injunctive relief barring respondents from relying on the Active Work Rule is "essentially indistinguishable from a demand for

payment." *Id.* at 13a n.7. Accordingly, the court considered itself "obliged to follow [this] Court's decision in *Great-West* and deny § 502(a)(3) relief." *Id.* at 14a.

Judge Benavides concurred specially. He wrote:

> The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

Pet. App. 14a.

DISCUSSION

The court of appeals erroneously held that Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), does not authorize a suit by a plan beneficiary against a plan fiduciary for monetary relief equal to the insurance benefits that the beneficiary would have received but for the fiduciary's breach of its fiduciary duty. That kind of suit is directly analogous to an action against a breaching trustee for monetary redress of a breach of trust, an action that was typically available in courts of equity in the days of the divided bench. The suit therefore seeks "equitable relief" and is authorized by Section 502(a)(3).

The question whether Section 502(a)(3) authorizes suits seeking monetary redress from breaching fiduciaries has divided the courts of appeals. The availability of those suits is critical to ERISA's goal of protecting plan participants and beneficiaries through the creation and enforcement of stringent fiduciary duties. If those suits are not available, numerous participants and beneficiaries who have suffered serious economic injuries because of fiduciary breaches will be left without any meaningful remedy, a result Congress could not have

intended when it enacted ERISA. This Court granted review on the Section 502(a)(3) issue in *LaRue* v. *DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1023 (2008). The Court did not address the issue, however, because it resolved the case on other grounds. *Ibid.* Therefore, the Court should grant the petition for a writ of certiorari in this case to eliminate the confusion among the courts of appeals and to ensure that plan participants and beneficiaries are not deprived of the protections provided by ERISA.

A. The Decision Of The Court Of Appeals Is Incorrect

1. ERISA seeks "to protect * * * participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. *Central States Southeast and Southwest Areas Pension Fund* v. *Central Transp. Inc.*, 472 U.S. 559, 570 (1985). Congress intended trust law to inform interpretation of both ERISA's fiduciary duties and the remedial provisions designed to enforce those duties. *Varity Corp.* v. *Howe*, 516 U.S. 489, 502 (1996); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); H.R. Conf. Rep. No. 280, 93d Cong., 2d Sess. 295 (1975).

The remedial provision at issue here, Section 502(a)(3), authorizes participants and beneficiaries to sue to obtain "appropriate equitable relief" to redress violations of ERISA, including its fiduciary duties, or to enforce ERISA's requirements or the terms of the plan. 29 U.S.C. 1132(a)(3). This Court has addressed the

scope of the "equitable relief" available under Section 502(a)(3) in three principal cases.

First, in *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993), the Court held that "equitable relief" means relief that was "*typically* available in equity." *Id.* at 256. Applying that standard, the Court concluded that Section 502(a)(3) does not permit a suit seeking money damages from a *non*-fiduciary (an actuary) who provided services to a plan. *Id.* at 256-263.[2]

The Court revisited the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). That case involved a plan's suit against a beneficiary to enforce a provision in a health insurance contract requiring the beneficiary to reimburse the plan for medical benefits for which the beneficiary received a recovery from a third party. *Id.* at 207. The Court held that the monetary recovery sought by the plan was not equitable restitution because the recovery would be paid, not from an identifiable *res* to which the plan claimed a right, but from the general assets of the beneficiary. *Id.* at 210. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is

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[2] Such non-fiduciaries have "no real power to control what the plan d[oes]," *Mertens*, 508 U.S. at 262, and their role is therefore somewhat peripheral under ERISA. Moreover, courts of appeals "routinely find that garden-variety state-law malpractice or negligence claims against non-fiduciary plan advisors, such as accountants, attorneys, and consultants, are not preempted" by ERISA under 29 U.S.C. 1144(a). *Gerosa* v. *Savasta & Co.*, 329 F.3d 317, 324 (2d Cir.) (citing cases), cert. denied, 540 U.S. 967, and 540 U.S. 1074 (2003). By contrast, the role of fiduciaries, who have primary responsibility for administration and control of ERISA-covered plans, see *Mertens*, 508 U.S. at 262, is central under ERISA, and state-law suits against fiduciaries by participants and beneficiaries would be preempted by ERISA, see p. 18, *infra*.

legal or equitable" under Section 502(a)(3) "depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted; brackets in original).

The Court most recently addressed the meaning of "equitable relief" in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). There, the Court held that a plan could enforce a reimbursement provision under Section 502(a)(3) because the beneficiary had preserved the disputed funds pending resolution of the claim, and the plan sought to enforce "an equitable lien established by agreement" over those funds. *Id.* at 362-368. The Court concluded that the plan sought "equitable relief" within the meaning of Section 502(a)(3) because both the basis for the plan's claim and the relief it sought would have been considered equitable in the days of the divided bench. *Ibid.*[3]

2. Under the analysis set forth in those cases, petitioner's suit against a plan fiduciary to recover monetary losses caused by a breach of fiduciary duty seeks "equitable relief." Her suit is directly analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust. Both the basis for

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[3] The Court has also addressed the scope of Section 502(a)(3) in other cases. For example, in *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000), the Court held that an action for restitution or disgorgement of profits against someone who had benefitted from a breach of trust qualified as equitable relief under Section 502(a)(3). And, in *Varity Corp.*, 516 U.S. at 512, the Court stated that Section 502(a)(3) is a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Based on that understanding, the Court held that Section 502(a)(3) authorized the reinstatement of the plaintiff employees to a plan that they had been tricked into leaving by the plan fiduciary. *Id.* at 492, 507-515.

the claim—breach of trust—and the requested relief—monetary redress that was sometimes called "surcharge"—were considered equitable in the days of the divided bench.

Indeed, the equity courts exercised *exclusive* jurisdiction over claims by a beneficiary against a trustee for breach of trust, subject to limited exceptions that do not apply here. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); *id.* § 198, at 434; 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 151, at 184 (4th ed. 1918) (Pomeroy); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 975, at 175 (12th ed. 1877) (Story); see *Duvall* v. *Craig*, 15 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, only suable in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust.").[4]

Equity provided a variety of remedies for breach of trust. Second Restatement § 199, at 437. One equitable remedy was "to compel the trustee to redress [the]

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[4] Equity recognized both express and implied trusts. 1 Pomeroy § 152, at 185; 2 Story § 1195, at 434. Express trusts arose when the parties had objectively manifested the intent to create a trust relationship, although neither a written document nor the use of any formal or technical words was required. Second Restatement §§ 2, 24, at 6-12, 67. Implied trusts arose by operation of law, for example, when one person held legal title to property but the consideration had been provided by another. *Id.* §§ 404, 440, at 326, 393; 1 Pomeroy § 155, at 189-190; 3 *id.* § 1037, at 2345-2346. Equity courts would also exercise jurisdiction over actions against individuals who were not actual trustees but who owed fiduciary duties to the complaining parties. 1 *id.* § 157, at 193-194; 3 *id.* §§ 1088, 1097, at 2510-2511, 2535-2536. Those quasi-trustees included executors and administrators of estates, guardians, corporate directors, agents and the like. *Ibid.*

breach," including by "the payment of money." *Ibid.*; 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 199.3, at 206 (4th ed. 1987) (Scott); see 3 Pomeroy § 1080, at 2481-2482; 2 Story §§ 1266-1278, at 519-534. That monetary recovery, which was sometimes referred to as "surcharge," required the breaching fiduciary to pay "the amount necessary to compensate fully for the consequences of the breach," by, for example, "restor[ing] the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see 3 Scott § 205, at 238-239; *Black's Law Dictionary* 1482 (8th ed. 2004); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Mosser* v. *Darrow*, 341 U.S. 267, 270-273 (1951); *Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456, 458, 463-464 (1939). Depending on the circumstances, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott § 205, at 237; see Second Restatement § 205, at 458.[5]

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[5] The equitable remedies for breach of trust applied to implied trusts as well as express trusts. See 2 Story §§ 1266-1278, at 519-534 (discussing monetary relief for breach of trust in chapter on implied trusts); James P. Holcombe, *An Introduction to Equity Jurisprudence on the Basis of Story's Commentaries* 246-249 (1846) (same); *e.g.*, *Jones* v. *Van Doren*, 130 U.S. 684, 692 (1889) (court of equity may award monetary relief necessary "fully to indemnify the plaintiff" when trustee has sold real property held in implied trust); *Adair* v. *Shaw*, 1 Schoales & Lefroy 243, 262, 272 (Ir. High Ct. Ch. 1803) (person who comes into property bound by a trust with knowledge of the trust is treated as a trustee and is chargeable in equity for breach of trust whether or not he benefitted from the breach). Equity courts would also surcharge

Liability for breach of trust could be imposed "either in a suit brought for that purpose or on an accounting where the trustee [was] surcharged beyond the amount of his admitted liability." George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 862, at 36 (rev. 2d ed. 1995). Depending on the nature of the breach, the monetary recovery could be paid to the beneficiary rather than the trust itself. See, *e.g.*, *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); *Kendall* v. *DeForest*, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency resulting from breach of trust that had depleted annuity fund); cf. *United States* v. *Mitchell*, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual Indian beneficiaries could sue for monetary compensation for losses allegedly caused by government's violation of statutes imposing specific duties concerning management of timber).

Equity courts surcharged fiduciaries for breaches very similar to the one at issue in this case. See, *e.g.*, *Marriott* v. *Kinnersley*, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to pay premium on life insurance policy); see also *Appeal of the Harrisburg Nat'l Bank*, 84 Pa. 380, 383 (1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost). Accordingly, petitioner's suit, which requests monetary redress equal to the life

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quasi-trustees who had breached their fiduciary duties. See, *e.g.*, *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam) (executor); *Bosworth* v. *Allen*, 61 N.E. 163, 165-166 (N.Y. 1901) (corporate directors).

insurance benefits that she lost because of Spherion's breach of its fiduciary duties, seeks "equitable relief" under Section 502(a)(3), and the court of appeals erred in holding to the contrary. Cf. *Harris Trust & Savs. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (relying on the historical availability of an action in equity against a person who acquired property from a breaching fiduciary in concluding that such a suit seeks "equitable relief" within the meaning of Section 502(a)(3)).

The court of appeals mistakenly believed that its holding was compelled by *Mertens*, *Great-West*, and *Sereboff*. See Pet. App. 6a-14a. Unlike petitioner, however, the plaintiffs in *Mertens* did not seek to surcharge fiduciaries with the loss they suffered, but instead sought damages for that loss from a *non*-fiduciary third party. See 508 U.S. at 253-254, 262; cf. *Appeal of the Harrisburg Nat'l Bank*, 84 Pa. at 383-384 (court of equity has no jurisdiction to order third party who is holding life insurance proceeds that administrator negligently failed to collect to pay those proceeds to estate). Likewise, *Great-West* involved neither a suit against a fiduciary nor a suit to obtain the equitable remedy of surcharge, but instead a suit by the plan for money damages under a contract. See 534 U.S. at 212-218. Neither case indicates that Section 502(a)(3) does not authorize petitioner's suit.

Nor does *Sereboff* "confirm," as the court of appeals apparently believed, that a monetary recovery qualifies as "equitable relief" under Section 502(a)(3) only if it constitutes equitable restitution of a "disputed res." Pet. App. 8a-9a, 12a. On the contrary, *Sereboff* reiterates that a suit seeks "equitable relief" whenever the basis for the claim and the relief sought would have been con-

sidered equitable in the days of the divided bench. See 547 U.S. at 362-368. And the Court held that Section 502(a)(3) authorizes a form of monetary relief, an "equitable lien 'by agreement,'" that the Court expressly distinguished from equitable restitution. *Id.* at 364-365.

B. The Courts Of Appeals Are Divided On Whether Suits Against Fiduciaries For Monetary Redress Of Fiduciary Breaches Seek Equitable Relief

1. The decision of the court of appeals warrants this Court's review because it deepens an existing conflict among the courts of appeals. Most courts of appeals, like the court below, have mistakenly concluded that this Court's cases dictate the conclusion that Section 502(a)(3) does not authorize suits against an ERISA fiduciary for monetary redress of losses caused by a breach of fiduciary duty. See *Goeres* v. *Charles Schwab & Co.*, 220 Fed. Appx. 663 (9th Cir. 2007), petition for cert. pending, No. 06-1521 (filed May 15, 2007); *Todisco* v. *Verizon Communications, Inc.*, 497 F.3d 95, 99-100 (1st Cir. 2007); *Coan* v. *Kaufman*, 457 F.3d 250, 262-264 (2d Cir. 2006) (reversing prior holding in *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999)); *Calhoon* v. *TWA*, 400 F.3d 593, 596-598 (8th Cir. 2005); *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401, 404-409 (10th Cir. 2004); *Helfrich* v. *PNC Bank., Ky., Inc.*, 267 F.3d 477, 481-482 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); see also *Fox* v. *Herzog Heine Geduld, Inc.*, 232 Fed. Appx. 104, 106 (3d Cir. 2007) (holding that, under *Great-West*, "[i]n order to award equitable relief under § 502(a)(3), 'money or property identified as belonging in good conscience to the plaintiff [must] clearly be traced to particular funds or property in the defendant's possession'") (citation omitted; brackets in

original). The Seventh Circuit, on the other hand, has held that Section 502(a)(3) does authorize such suits because monetary relief, "when sought as a remedy for breach of fiduciary duty[,] * * * is properly regarded as an equitable remedy." *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (2000) (citation omitted).[6]

The Seventh Circuit has not chosen to revisit *Bowerman* after *Great-West*. On the contrary, in a decision that post-dates *Great-West*, the court of appeals remanded to allow the plaintiff to amend his complaint to add ERISA claims because, in the court's view, "ERISA 'as currently written and interpreted, may allo[w] at least some forms of "make-whole" relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench." *McDonald* v. *Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) (citation omitted).

2. The confusion about whether monetary redress from a breaching fiduciary is equitable relief recoverable under Section 502(a)(3) has also generated a related conflict among the courts of appeals. Until recently, all the courts of appeals that have considered an action for monetary relief against a breaching fiduciary under Section 502(a)(2) or (a)(3) of ERISA have concluded that there is no right to a jury trial because the claims are equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36

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[6] Although the Seventh Circuit denominated the remedy in that case "restitution," it approved an award of the benefits that the participant would have received but for the breach, precisely what petitioner is requesting in this case. *Bowerman*, 226 F.3d at 592. Moreover, the court rested its conclusion on the fact that actions and remedies against a fiduciary for breach of fiduciary duty have traditionally been viewed as equitable. See *ibid.* (citing *Strom*, 202 F.3d at 144-145).

F.3d 1308, 1323-1324 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); accord *Broadnax Mills, Inc.* v. *Blue Cross & Blue Shield*, 876 F. Supp. 809, 816-817 (E.D. Va. 1995). Likewise, courts have generally held that there is no right to a jury trial in non-ERISA cases where the plaintiffs seek monetary recovery for fiduciary breaches. See, *e.g.*, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Uselman* v. *Uselman*, 464 N.W.2d 130, 137-138 (Minn. 1990); *First Ala. Bank* v. *Spragins*, 475 So. 2d 512, 514 (Ala. 1987) (per curiam); accord *Camrex (Holdings) Ltd.* v. *Camrex Reliance Paint Co.*, 90 F.R.D. 313, 321 (E.D.N.Y. 1981) (no jury trial in shareholder derivative action for accounting from breaching fiduciary).

The Second Circuit, however, recently held that the defendants were entitled to a jury trial in a non-ERISA case in which shareholders sought to recover monetary losses from corporate fiduciaries accused of breaching their fiduciary duties. *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2005), cert. denied, 547 U.S. 1147 (2006). Based on this Court's analysis in *Great-West* of the scope of equitable relief available under ERISA, the Second Circuit concluded that such a remedy is necessarily "legal" rather than "equitable," and therefore fiduciary defendants are entitled to a jury trial. *Id.* at 340-341. The court of appeals determined that *Great-West* dictated that result even though, as the concurring judge pointed out, it is "at odds with centuries of equitable proceedings involving claims against trustees, estate executors, and other fiduciaries." *Id.* at 344.

Relying on reasoning similar to the Second Circuit's analysis in *Pereira*, district courts have begun to hold that jury trial trials are available in breach of fiduciary duty cases under ERISA, despite the prior uniform precedent to the contrary. See, *e.g.*, *Chao* v. *Meixner*, No.

1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007); *Ellis* v. *Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367, at * 4 (W.D. Mich. Apr. 2, 2007); *Bona* v. *Barash*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003). This Court should grant the petition for a writ of certiorari to eliminate the confusion among the lower courts on whether monetary redress against a breaching fiduciary is "equitable relief."

C. The Question Presented Is Important

The question whether Section 502(a)(3) authorizes monetary relief against plan fiduciaries who have breached their duties is an important one. The narrow view of Section 502(a)(3) adopted by most courts of appeals would leave many plan participants and beneficiaries who have been harmed by fiduciary breaches without any meaningful remedy. Congress could not have intended that result, which would severely undermine ERISA's express statutory goal of "protect[ing] * * * the interests of participants in employee benefit plans and their beneficiaries" by imposing stringent duties on plan fiduciaries and providing "ready access to the Federal courts" to remedy breaches of those duties. 29 U.S.C. 1001(b).

ERISA's broad preemption provision forecloses state-law remedies against plan fiduciaries who breach their duties under ERISA. See 29 U.S.C. 1144(a); *e.g.*, *Peralta* v. *Hispanic Bus., Inc.*, 419 F.3d 1064, 1069 (9th Cir. 2005); *Eckelkamp* v. *Beste*, 315 F.3d 863, 870 (8th Cir. 2002); *Dudley Supermarket, Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 4 (1st Cir. 2002); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996). Therefore, if a plan participant or beneficiary

who has been injured by a fiduciary breach has no effective remedy under ERISA, he has no effective remedy at all. And many injured participants and beneficiaries, particularly in welfare plans, will have an effective remedy under ERISA only if they can obtain relief under Section 502(a)(3).

ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), allows a participant or beneficiary to sue for benefits under the plan. But a participant or beneficiary is unlikely to have a viable benefits claim if, like petitioner, she was prevented from learning about and meeting the written requirements of the plan because of a fiduciary breach. Indeed, in this case, petitioner filed a benefits claim with the plan, but her claim was denied, and that denial was affirmed on administrative appeal. See p. 3, *supra*.

Nor is it likely that the injured participant or beneficiary would have a claim under Section 502(a)(2), 29 U.S.C. 1132(a)(2). That provision only allows recovery of "losses to the plan." 29 U.S.C. 1109(a). It therefore does not authorize a recovery by a participant or beneficiary who has received fewer benefits, or failed to qualify for benefits at all, because of a fiduciary breach, unless there is a corresponding loss to the plan itself. See, *e.g.*, *Varity*, 516 U.S. at 515; *Goeres*, 220 Fed. Appx. at 663.

Because of the limited relief available under ERISA's other remedial provisions, a wide range of injuries would likely go unredressed if Section 502(a)(3) did not provide monetary relief for fiduciary breaches. For example, there would likely be no recovery for a plan participant who was left without health insurance during a costly illness because the plan fiduciary had negligently failed to submit the premiums. See, *e.g.*,

McFadden v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458 (N.D. Ohio 2000). Similarly, there would likely be no recovery for the widow of a plan participant who was left without the life insurance proceeds she expected because the fiduciary was negligent in processing the participant's application. See, *e.g.*, *Strom*, 202 F.3d at 140-141. Indeed, participants and beneficiaries would be unable to recover their lost benefits not only when fiduciaries negligently mishandled their payments, but even when fiduciaries intentionally diverted the payments for their personal use. Likewise, participants and beneficiaries would have no meaningful relief when they received significantly lower benefits because of misinformation provided by plan fiduciaries. See, *e.g.*, *Goeres*, 220 Fed. Appx. at 663; *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 373-374 (4th Cir. 2001).

For these reasons, the narrow reading of Section 502(a)(3) mistakenly adopted by the court below and other courts of appeals has led to a "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (citation omitted); see Pet. App. 14a (Benavides, J. concurring specially); *Eichorn* v. *AT&T*, 489 F.3d 590, 592-593 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); *Lind* v. *Aetna Health, Inc.*, 466 F.3d 1195, 1200 (10th Cir. 2006); *Pereira*, 413 F.3d at 345-346 (Newman, J. concurring); *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring); *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004).

Legal scholars have echoed the concern that participants and beneficiaries should not be left "betrayed

without a remedy." Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827, 852 (2006); see, *e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. Law Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U.L.Q. 671 (1994). Accordingly, this Court should grant review and correct the court of appeals' misinterpretation of Section 502(a)(3) by holding that monetary relief is available against fiduciaries who breach their ERISA duties.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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